Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1996

RICHARD D. DONOHOO, CRAIG R. MATHIES, CHERYL C. GODBOUT-BANDAL AND BRUCE A. RASMUSSEN,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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A. Questions for Review

1. Is it an unconstitutional exercise of the police power for the FDIC to seek hundreds of millions of dollars of penalties against an individual for an alleged statutory violation when there has been no harm to a depository institution or the government?

2. Is it an unconstitutional exercise of the police power for the FDIC to assess a million dollars of penalties against an individual for an alleged statutory violation when there has been no harm to a depository institution or the government?

3. Is an individual guaranteed a jury trial by the Seventh Amendment of the United States Constitution when the FDIC seeks hundreds of millions of dollars of penalties for an alleged statutory violation and there has been no harm to a depository institution or the government?

4. Is an individual guaranteed a jury trial by the Seventh Amendment of the United States Constitution when the FDIC assesses a penalty in excess of one million dollars and there has been no harm to a depository institution or the government?

5. Is an individual guaranteed a speedy and public trial by an impartial jury by the Sixth Amendment of the United States Constitution when the FDIC seeks hundreds of millions of dollars of penalties for an alleged statutory violation and there has been no harm to a depository institution or the government?

6. Is an individual guaranteed a speedy and public trial by an impartial jury by the Sixth Amendment of the United States Constitution when the FDIC assesses penalties in excess of one million dollars when there has been no harm to a depository institution or the government?

7. Is a penalty in excess of one million dollars assessed by the FDIC against an individual for an alleged violation of statute when there has been no harm to a depository institution or the government an excessive fine and therefore violative of the Eighth Amendment?

8. Is a penalty in excess of one million dollars assessed by the FDIC against an individual for an alleged violation of statute when there has been no harm to a depository institution or the government cruel and unusual punishment and therefore violative of the Eighth Amendment?

B. List of all Parties

The federal agency involved is the Federal Deposit Insurance Corporation.

The petitioners are Richard D. Donohoo, Craig R. Mathies, Bruce A. Rasmussen and Cheryl C. Godbout-Bandal.

Others parties in the proceedings below include Wayne Field, Lindquist & Vennum, and Bruce A. Rasmussen & Associates, Ltd., the latter two being law firms representing the bank Capital Bank, which is a state chartered bank under the laws of the state of Minnesota and insured by the FDIC. Messrs. Donohoo and Mathies were shareholders, directors and officers of Capital Bank; Mr. Rasmussen was a shareholder and director; Ms. Godbout-Bandal and Mr. Field were shareholders only. In 1990 and in September, 1992, the date of the commencement of the FDIC proceedings, all of the individuals were residents of the state of Minnesota. The two law firms maintained offices in Minneapolis, Minnesota. Capital Bank is located in Saint Paul, Minnesota.

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Decision and Order, Federal Deposit Insurance Corporation, Docket Nos. FDIC-92-249c&b, 250e, 251e, and 252k

E. Basis for Jurisdiction

The Opinion of the Eighth Circuit Court of Appeals was filed on January 8, 1997. A Petition for Rehearing by Panel and Petition for Rehearing En Banc was timely filed on February 21, 1997. The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc was dated March 21, 1997.

This Petition is filed within 90 days after entry of the Order denying discretionary review pursuant to Rule 13 of the Rules of the Supreme Court of the United States.

The statutory provision conferring on this Court jurisdiction to review by a writ of certiorari the opinion of the Eighth Circuit and resulting judgment is 28 U.S.C. §1254.

Notification has been made to the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Ave., N. W., Washington DC 20530; the Federal Deposit Insurance Corporation, 550-17th Street N. W., Washington DC 20429; and Mr. Wayne Field, 3420 Heritage Drive, Edina, MN 55435.

F. Constitutional Provisions and Statutes Involved

The Constitutional Provisions include Amendments 6, 7, and 8 of the Constitution of the United States and are set out in the Appendix, page A-1.

The Statutes include the following:

12 U.S.C. § 1817(j) (1989) at Appendix, page A-2

12 U.S.C. § 1817(j)(16) (1989) at Appendix, page A-3

12 U.S.C. § 1818(i)(2)(E)(F)(G) and (I) (1989) at Appendix, page A-6

G. Statement of the Case

Petitioners were shareholders and some were directors and officers of a Minnesota chartered banking corporation which is regulated by the Minnesota Department of Commerce and the Federal Deposit Insurance Corporation (FDIC). The bank was failing and petitioners separately purchased stock in it to prevent closure by the FDIC, but, on the advice of counsel that it was not required, did not request the FDIC's approval under the Change in Bank Control Act. More than two years later, the FDIC initiated an enforcement action against petitioners alleging violations of the Change in Bank Control Act and seeking so called "civil penalties" against each of them of $772,000,000. An administrative hearing ensued which established that the failure to comply with the Change in Bank Control Act resulted in no harm to the bank or to the government but which culminated with the FDIC's Board of Governors assessing $2,534,750 in penalties against the individuals who purchased the bank stock including petitioners and additional penalties against the law firm which rendered the advice. The Eighth Circuit Court of Appeals affirmed the FDIC as to petitioners but exonerated the law firm. Petitioners allege that the Change in Bank Control Act and the FDIC's charges, proceedings and penalties thereunder are an unconstitutional exercise of the police power and have deprived petitioners of their rights, privileges and protections under the Sixth, Seventh and Eighth Amendments to the United States Constitution.

The basis for federal jurisdiction is 12 U.S.C. §1818(h)(2) which permits a party to any FDIC proceeding to

> obtain a review of any order served . . . by the filing in the court of appeals . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28 of the United States Code.

Section 1254 provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

H. Argument

The Eighth Circuit of the United States Court of Appeals, by affirming the Decision and Order of the Federal Deposit Insurance Corporation, has denied to petitioners their basic constitutional rights and sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

In July of 1990, during the apex of the banking crisis, petitioners and Mr. Field recapitalized the failing state-chartered Capital Bank by investing $1 million in the Bank in exchange for stock after obtaining the approval of the state of Minnesota, Department of Commerce. This $1 million recapitalization was undertaken at the behest of the FDIC, which was threatening to terminate Capital Bank's insurance (and thereby close the Bank) if a capital increase was not made. The petitioners' $1 million capital investment and sound management cured the Bank's financial problems, obviating the threat of failure and thus saving United States taxpayers the millions of dollars which would have been spent by the government had the Bank failed.

Rather than congratulating petitioners, the FDIC, in 1992, initiated against petitioners an extremely punitive enforcement proceeding, claiming that petitioners violated, *inter alia*, the Change in Bank Control Act by failure to give the requisite notice to the FDIC pursuant to 12 U.S.C. § 1817(j). The FDIC also claimed that petitioners violated Regulation O (12 C.F.R. Part 215) and Section 23A (12 U.S.C. §371(c)). Other than one minor violation of no importance herein, the FDIC conceded that these alleged

Regulation O violations are premised upon the establishment of a violation of the Change in Bank Control Act. Shortly after their investment, at a bank board of directors meeting requested by the FDIC's regulators at which they were threatened with $1 million per day penalties, petitioners offered to reverse the capital insertion. The regulators refused this request and advised that any reversal of the investment would constitute a further violation and result in more penalties.

The FDIC initiated the underlying enforcement proceeding in September, 1992, over two years after the $1 million recapitalization and after petitioners had transformed Capital Bank from a failing institution in a thriving, healthy bank.

The FDIC sought the third tier of penalties under 12 U.S.C. § 1817(j)(16)(C) and (D), which provides for a maximum daily penalty of $1,000,000 for each individual. Because the FDIC took the position that the penalties accrued from the date of their investment to the initiation of the enforcement proceeding, 772 days, each petitioner was exposed to civil penalties of $772,000,000 for his/her violation of the Bank Change in Control Act. The total amount sought was billions of dollars. Although this may seem absurd, the FDIC enforcement counsel never wavered in their effort to impose these draconian penalties.

This is admitted by the FDIC in footnote 71 on page 75 of its Decision and Order (A-117), to wit:

> FDIC Enforcement Counsel assert that they have alleged the necessary elements to maintain the higher Second Tier and Third

Tier penalties authorized under sections 7(j)(16) and 8(i)(2) of the FDI Act.

Throughout the proceeding, each petitioner was always in jeopardy of being assessed with civil penalties of hundreds of millions of dollars.

In point of fact, footnote 71 (A-117) is a good example of the enormity of the penalties available to the FDIC bureaucrats and the attendant dangers. Even the "modest" First Tier penalties total almost $74 million dollars for all alleged violations. And, when only the alleged violations of the Change in Bank Control Act is considered, the First Tier penalties are $3,860,000 each or a total of $19,300,000. Clearly the FDIC has the power to destroy even the wealthiest individual let alone the petitioners who are of modest means. Our country and the Constitution is founded on keeping such unbridled power out of the hands of bureaucrats. *See* Justice Holmes's exposition in *Pennsylvania Coal Co. V. Mahon*, 260 U.S. 393, 28 ALR 1321 (1922).

The FDIC ordered penalties in the following amounts:

Mr. Donohoo	$ 1,000,554
Mr. Mathies	$ 975,554
Mr. Rasmussen	$ 38,600
Ms. Godbout-Bandal	$ 150,000
Mr. Field	$ 370,012

for a total of $2,534,750. This is exactly the amount recommended by the FDIC's Administrative Law Judge and exactly the amount affirmed by the court below, and is

a dramatic example of the inefficacy of judicial review and the necessity of a trial de novo, as was required prior to 1989.

When compared to the $772,000,000 exposure of each Petitioner for his/her alleged violation of the Change in Bank Control Act, the actual fines appear puny. This is grossly misleading. To petitioner Donohoo, for example, $1,000,554 represents economic destruction without a day in court. The same is true of the other petitioners. These penalties are manifestly draconian when it is realized that there was no harm to Capital Bank or the FDIC.

The FDIC claims that it is entitled to deprive the petitioners of the "financial benefit derived as a result of the violations." There is no statutory authority for this claim and, in point of fact, petitioners' financial benefits were not related to their failure to file under the Change in Bank Control Act. Indeed, there is nothing in the record to show that the Change in Control would not have been approved if requested. Absent such a showing, it must be assumed that had petitioners requested approval, it would have been received and there would have been no penalties.

Petitioners purchased their Capital Bank stock in July, 1990 when Capital Bank was under threat of closure by the FDIC and sold it in December of 1992 after Capital Bank had recovered. The Bank's recovery was not accidental, but the consequence of petitioners' investment and good management. (The Bank's financial problems were caused by bad loans by former management; these bad loans were made under the FDIC's watch.) As a result, the Bank had increased in value. The FDIC seeks to punish petitioners for saving the Bank. In this regard, it

should be noted that petitioners proposed to the FDIC regulators, at a bank board of directors meeting attended by the regulators that they withdraw their investment shortly after it was made when the regulators threatened to impose their draconian penalties. The FDIC regulators refused this request because they knew that Capital Bank would fail without petitioners' investment. If petitioners had been permitted to withdraw their investment and the Bank had failed, the onus of failure would have been on the FDIC and not on petitioners, and this was unacceptable to the regulators. But, if the regulators had approved the withdrawal, there would have been no violation and hence no penalties. Thus, all of the penalties are the direct consequence of the FDIC's unwarranted and self-serving refusal to permit petitioners to withdraw their investments.

Who was damaged by the alleged failure to file the notice?

Damage to FDIC:	nothing
Damage to taxpayers:	nothing
Damage to Capital Bank:	nothing

Who benefited by the insertion of the $1 million? The FDIC and taxpayers benefited since Capital Bank did not require FDIC and governmental intervention and assistance. Capital Bank benefited since it survived and now is a healthy institution.

The only losers in this sordid saga are the petitioners. They were threatened by the FDIC regulators for two years before commencement of the enforcement proceeding and have subsequently been in litigation for almost five years subject to draconian penalties for the

failure to file a document for change of control. This document was not filed because the petitioners, after review of the matter by counsel and on their advice, did not file the document. Counsel had advised that filing was not required. (At oral argument to the Eighth Circuit, Bank counsel stated that in hindsight they would still offer the same advice.)

As admitted by the FDIC, no individual petitioner directly acquired 25 percent or more of the stock. (Order and Decision at 11, A-51). Furthermore, there is no evidence of any written voting agreement, buy-sell arrangement, or cross-pledge of collateral among the individual Respondents. (Order and Decision at 27, 28, A-68, 69).

Petitioners were advised by counsel that they could not act in concert and did not do so. There is no evidence that they ever did so. Indeed, the court below reasoned that it was petitioners' mere intent to act in concert - rather than acting in concert - which convicted them. This is a concept foreign to the common civil law and in and of itself justifies reversal. Petitioners conscientiously complied with the law and have nevertheless been convicted of violating it.

Nothing changed at Capital Bank as a consequence of the insertion of the $1 million of capital other than the Bank was now on better footing and could survive. The directors, officers and employees remained the same. The operation and control of the Bank remained unchanged.

Prior to 1989, 12 U.S.C. 1817(j) provided for the assessment of damages for willful violations only and a trial

de novo in the district court. 12 U.S.C. 1817(j) then provided in part:

> Any person who willfully violates any provision . . . shall forfeit and pay a civil penalty . . . The agency may collect such civil penalty by agreement with the person or by bringing an action in the appropriate United States district court, except that in any such action, the person against whom the penalty has been assessed shall have a right to trial de novo.

In 1989, the statute was amended to provide for three tiers of penalties, deleted for the first tier the "willful" requirement, and eliminated trial de novo in the district court. Thus, as occurred in petitioners' case, the penalties were imposed by the FDIC Board of Governors after an FDIC administrative hearing before an FDIC administrative law judge subject only to review by the Circuit Court. Petitioners have never had their day in court. The bureaucratic penalties, since imposed on a daily basis, were increased to gargantuan amounts by the FDIC's unconstitutional delay in initiating the enforcement action.

How did it happen that such draconian penalties were imposed on these petitioners when their failure to file an application under the Change in Bank Control Act caused no harm?

It started with the enforcement action in September, 1992, over two years after the capital insertion, followed by an FDIC administrative hearing before its administrative law judge in the late April and early May, 1993. His recommended decision was filed in September, 1994, some

eight months after it was due. (12 C.F.R. § 308.38 requires the administrative law judges to file their decisions within 45 days after the filing of Reply Briefs). Pursuant to the FDIC's rules, the Board of Governors Decision in this matter was due on January 9, 1995. The Decision was "issued" on July 5, 1995 but not served on petitioners until August 21, 1995. *See* 12 C.F.R. § 308.39(c)(2).

Thus, a clearly penal amount was imposed without any of the protections and rights that accused criminals possess. There was no jury trial. There was no speedy trial and indeed the administrative agency extended and delayed its decision even beyond its own rules. King George would have been proud.

Although the police power is a necessary attribute of every civilized government, it is fundamental that police regulations must be reasonable in all circumstances. In the present case, there has been no harm to the FDIC and no harm to Capital Bank. Nevertheless, the enforcement personnel of the FDIC sought billions of dollars of penalties and the Board of Governors assessed millions of dollars of penalties, neither of which have any justification whatsoever. This is manifestly an abuse of the police power. It is unduly oppressive, discriminatory, capricious, whimsical, and arbitrary. *American Cancer Soc. v. Dayton*, 160 Ohio St. 114, 51 Ohio Ops. 32, 114 N.E.2d 219 (1953); *Twentieth Century Associates, Inc. v. Waldman*, 294 N.Y. 571, 63 N.E.2d 177 (1945); *see, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).

It is well established that constitutional rights cannot be abridged under the guise of police regulations. *Dobbins v. Los Angeles*, 195 U.S. 223 (1904). In the instant case,

the FDIC has deprived petitioners of their Seventh Amendment rights to a jury trial, of their Sixth Amendment rights to a speedy and public trial by an impartial jury, and of their Eighth Amendment protection against excessive fines and cruel and unusual punishment.

The Seventh Amendment entitled petitioners to a jury trial. This case is a claim by an agency of the government against petitioners personally for money for a merely harmless violation for what at worst was a failure to file a form. The FDIC has never contended that petitioners were unlikely to receive approval if an application for change in control had been filed. There are no reported cases which support the denial of petitioners' right to a jury trial. Nowhere has the police power been utilized to impose such draconian fines as are present here in the absence of any harm whatsoever.

Indeed the fines are so draconian as to render the proceeding criminal in nature, thereby entitling petitioners to the protections of the Sixth and Eighth Amendment. A crime is an act which invokes a specified punishment. The punishment is sufficient to make an act a crime without any explicit declaration that is a crime. In this respect, a provision for a fine is usually sufficient, notwithstanding that the amount may be small. *State v. Central Lumber Co.*, 24 S.D. 136, 123 N.W. 504 (1909), *aff'd.* 226 U.S. 157 (1912); *United States v. Futura, Inc.*, 339 F. Supp. 162 (N.D. Fla. 1972); *State v. Ostwalt*, 118 N.C. 1208, 24 S.E. 660 (1896). Clearly, a fine of one million dollars per day makes the act of not filing the application a crime. Petitioners were charged with such a fine under tier three of 12 U.S.C. 1817(j) and are therefore entitled to the protections of the Sixth and Eighth Amendments.

Petitioners have been placed in jeopardy of devastating monetary penalties; they have not received a jury trial nor a speedy trial; they have had criminal law concepts applied to their conduct in a supposed civil proceeding; although no harm resulted from their alleged violations, they have been assessed huge penalties.

There is no question but that the petitioners were not afforded their Sixth and Eighth Amendment rights. The question is merely whether in the circumstances they were entitled to rights equal to those of common criminals.

Summary

In July of 1990, petitioners invested $1,000,000 in a failing bank and, consequently, the bank survived. Petitioners, average law-abiding citizens, engaged in owning and operating a small community bank, were advised by fully informed and experienced bank counsel that it was unnecessary to file an application under the Change in Bank Control Act and did not do so. There is no reason to believe the application if made would not have been approved. The state of Minnesota Department of Commerce gave advance approval of the investment and the FDIC had advance knowledge of the investment. Shortly after the investment was made, when threatened by the FDIC with penalties of one million dollars per day each for failing to file the application, petitioners offered to the FDIC regulators to reverse the transaction but the regulators refused to permit them to do so. Seven hundred and seventy-two days after the transaction, the FDIC commenced this enforcement proceeding against petitioners for alleged violations of the Change in Bank Control Act.

In the meantime, each petitioner has accrued penalties of $1,000,000 per day totaling $772,000,000.

If the FDIC had allowed petitioners to reverse their investment, there would have been no violation of the Change in Bank Control Act and no penalties. It the FDIC had promptly initiated the enforcement action, the petitioners' jeopardy would have been substantially decreased. Instead, the FDIC's regulators watched the petitioners "twist slowly in the wind," comfortable in the knowledge that for each day of delay another $1,000,000 accrued against each petitioner.

Prior to 1989, the FDI Act provided petitioners a trial de novo in the district court. This constitutional requirement was eliminated by the 1989 legislation. Thus petitioners were subjected to a hearing before an FDIC administrative law judge who made recommendations to the FDIC's Board of Governors. Once again petitioners were left twisting in the wind while the FDIC's administrative law judge missed his deadline by eight months. Then it was the FDIC's Board of Governors turn. They missed their deadline by six months. Thus, each petitioner lived under jeopardy of $772,000,000 for 1,857 days.

Petitioners' failure to file an application under the Change in Bank Control Act resulted in no harm to Capital Bank and no loss to the FDIC's insurance fund or to the government. Nevertheless, the FDIC's Board of Governors assessed over $ 2,500,000 in civil penalties. The penalties were exactly the amount recommended by the FDIC's administrative judge, and affirmed by the court below, which did nothing but exonerate the very law firm

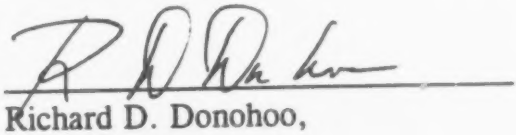
that advised petitioners that it was unnecessary to file an application under the Change in Bank Control Act.

What a travesty! What a mockery of the United States Constitution! Surely, if the Change in Bank Control Act is not unconstitutional on its face, it is unconstitutional in its application.

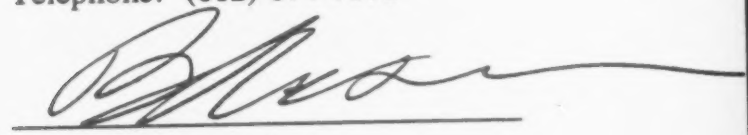
Conclusion

Petitioners respectfully request that their Petition be granted.

Respectfully submitted,



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Amendment 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment 7

Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment 8

Bail-Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

12 U.S.C. § 1817(j) in part:

(j) **Change in control of insured depository institutions.** (1) No person, acting directly or indirectly or through or in concert with one or more other persons, shall acquire control of any insured depository institution through a purchase, assignment, transfer, pledge, or other disposition of voting stock of such insured depository institution unless the appropriate Federal banking agency has been given sixty days' prior written notice of such proposed acquisition and within that time period the agency has not issued a notice disapproving the proposed acquisition or, in the discretion of the agency, extending for an additional 30 days the period during which such a disapproval may issue.

(16) Civil money penalty. (A) First tier. Any person who violates any provision of this subsection, or any regulation or order issued by the appropriate Federal banking agency under this subsection, shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(B) Second tier. Notwithstanding subparagraph (A), any person who--

(i) (I) commits any violation described in any clause of subparagraph (A);

(II) recklessly engages in an unsafe or unsound practice in conducting the affairs of a depository institution; or

(III) breaches any fiduciary duty;

(ii) which violation, practice, or breach--

(I) is part of a pattern of misconduct;

(II) causes or is likely to cause more than a minimal loss to such institution; or

(III) results in pecuniary gain or other benefit to such person,

shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(C) Third tier. Notwithstanding subparagraphs (A) and (B), any person who--

(i) knowingly--

(I) commits any violation described in any clause of subparagraph (A);

(II) engages in any unsafe or unsound practice in conducting the affairs of a depository institution; or

(III) breaches any fiduciary duty; and

(ii) knowingly or recklessly causes a substantial loss to such institution or a substantial pecuniary gain or other benefit to such person by reason of such violation, practice, or breach,

shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under subparagraph (D) for each day during which such violation, practice, or breach continues.

(D) Maximum amounts of penalties for any violation described in subparagraph (C). The maximum daily amount of any civil penalty which may be assessed pursuant to subparagraph (C) for any violation, practice, or breach described in such subparagraph is--

(i) in the case of any person other than a depository institution, an amount to not exceed $1,000,000; and

(ii) in the case of a depository institution, an amount not to exceed the lesser of--

(I) $1,000;000; or

(II) 1 percent of the total assets of such institution.

(E) Assessment; etc. Any penalty imposed under subparagraph (A), (B), or (C) shall be assessed and collected by the appropriate Federal banking agency in the manner provided in subparagraphs (E), (F), (G), and (I) of section 8(i)(2) [12 USCS §1818(i)(2)(E), (F), (G), and (I)] for penalties imposed (under such section) and any such assessment shall be subject to the provisions of such section.

(F) Hearing. The depository institution or other person against whom any penalty is assessed under

this paragraph shall be afforded an agency hearing if such institution or other person submits a request for such hearing within 20 days after the issuance of the notice of assessment. Section 8(h) [12 USCS §1818(h)] shall apply to any proceeding under this paragraph.

(G) Disbursement. All penalties collected under authority of this paragraph shall be deposited into the Treasury.

(E) Assessment. (i) Written notice. Any penalty imposed under subparagraph (A), (B), or (C) may be assessed and collected by the appropriate Federal banking agency by written notice.

(ii) Finality of assessment. If, with respect to any assessment under clause (i), a hearing is not requested pursuant to subparagraph (H) within the period of time allowed under such subparagraph, the assessment shall constitute a final and unappealable order.

(F) Authority to modify or remit penalty. Any appropriate Federal banking agency may compromise, modify, or remit any penalty which such agency may assess or had already assessed under subparagraph (A), (B), or (C).

(G) Mitigating factors. In determining the amount of any penalty imposed under subparagraph (A), (B), or (C), the appropriate agency shall take into account the appropriateness of the penalty with respect to--

(i) the size of financial resources and good faith of the insured depository institution or other person charged;

(ii) the gravity of the violation;

(iii) the history of previous violations; and

(iv) such other matters as justice may require.

(H) Hearing. The insured depository institution or other person against whom any penalty is assessed under this paragraph shall be afforded an agency hearing if such institution or person submits a

request for such hearing within 20 days after the issuance of the notice of assessment.

(I) Collection. (i) Referral. If any insured depository institution or other person fails to pay an assessment after any penalty assessed under this paragraph has become final, the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court.

(ii) Appropriateness of penalty not reviewable. In any civil action under clause (i), the validity and appropriateness of the penalty shall not be subject to review.

LINDQUIST & VENNUM, Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, Respondent.

Wayne FIELD, Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, Respondent.

Richard D. DONOHOO, Craig R. Mathies, Cheryl C. Godbout-Bandal, Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, Respondent.

Bruce ... RASMUSSEN, Bruce A. Rasmussen & Associates, Ltd., Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, Respondent.

Nos. 95-3203, 95-3226, 95-3256 and 95-3284.
United States Court of Appeals,
Eighth Circuit.
Submitted Oct. 21, 1996.
Decided Jan. 8, 1997.

Shareholders and directors and officers of bank and law firm that advised them in sale of shares in bank and represented bank in subsequent lawsuit arising from the sale petitioned for review of order of Federal Deposit Insurance Corporation (FDIC) prohibiting two individual petitioners from further participation in the banking industry, directing all petitioners to cease and desist from

violating Change in Bank Control Act (CBCA), and engaging in self-dealing and insider transactions, ordering individual petitioners to pay civil monetary penalties for statutory and regulatory violations, and ordering petitioners to reimburse bank for legal fees paid to the law firm on behalf of individual petitioners. The Court of Appeals, Heaney, Circuit Judge, held that: (1) finding that individual petitioners acted in concert was supported by substantial evidence; (2) finding that individual petitioners caused to be made and accepted insider loans, in violation of Regulation O, was supported by substantial evidence; (3) finding that directors engaged in unsafe and unsound banking practices in creating employment agreements and bonuses for officers was supported by substantial evidence; (4) finding that directors intentionally deceived federal and state bank examiners with respect to purpose, use, and terms of loan was supported by substantial evidence; (5) individual petitioners were properly ordered to cease and desist, but law firm was not; (6) monetary penalties were proper; and (7) law firm was not required to reimburse bank for legal fees paid.

Enforced in part.

Robert J. Sheran, argued, Minneapolis, MN (Mary E. Curtin and Susan E. Barnes, Minneapolis, MN, on the brief), for Lindquist & Vennum.

Mark R. Whitmore, argued, Minneapolis, MN (Lewis A. Remele, Jr., Minneapolis, MN, on the brief), for Wayne Field.

Mary E. Curtin, argued, Minneapolis, MN (Susan E. Barnes, Minneapolis, MN, on the brief), for Richard D.

Donohoo, Craig R. Mathies, Cheryl C. Godbout-Bandal.

Kathryn Norcross, FDIC, argued, Washington, DC, for the FDIC.

Before FAGG, HEANEY, and HANSEN, Circuit Judges.

HEANEY, Circuit Judge.

Petitioners seek review of an order of the Federal Deposit Insurance Corporation (FDIC) prohibiting Richard D. Donohoo and Craig R. Mathies from further participation in the banking industry; directing all petitioners to cease and desist from violating the Change in Bank Control Act of 1978 (CBCA), 12 U.S.C. § 1817(j) (1988), and engaging in self-dealing and insider transactions; ordering the individual petitioners to pay civil monetary penalties for statutory and regulatory violations; and ordering petitioners to reimburse Capital Bank for legal fees paid to two law firms on behalf of the individual petitioners. Petitioners describe their activities as an honest effort to save Capital Bank through recapitalization. The FDIC characterizes the effort as a devious attempt to gain control of Capital Bank at the expense of the majority shareholders in violation of the CBCA and Regulation O. Petitioners, who claim that the FDIC's determination was based on an improper interpretation of federal law and unsupported by the record, may be treated essentially as two sets of parties: five individuals who played various roles in Capital Bank and the sale of shares in the bank (individual petitioners); and two law firms that advised the individual petitioners in the sale of the Capital Bank shares and represented the bank in a subsequent lawsuit arising

from the sale (law firm petitioners). We enforce the portion of the FDIC's decision and order that imposes sanctions on the individual petitioners for unsafe and unsound banking practices and that requires petitioner Rasmussen to pay the outstanding balance and interest on a loan from People's Bank. We modify the order as it applies to reimbursement to Capital Bank for legal fees in the Wenzel Lawsuit, and deny enforcement of the order as it applies the FDIC's cease-and-desist authority to the law firm petitioners.

I. STANDARD OF REVIEW

We review the order of the FDIC pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706(2) (1988), and enforce the order if the FDIC made no errors of law and if its findings of fact are supported by substantial evidence on the record as a whole. *Oberstar v. FDIC,* 987 F.2d 494, 503 (8th Cir.1993). We review issues of law de novo. *Seidman v. OTS,* 37 F.3d 911, 924 (3d Cir.1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Culbertson v. Shalala,* 30 F.3d 934, 939 (8th Cir.1994). We may not substitute our judgment for that of the FDIC. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 823-24, 28 L.Ed.2d 136 (1971). If an agency considered a recommendation by an Administrative Law Judge (ALJ), we review the ALJ's recommendation as part of the record and require an agency to show that it gave the recommendation "attentive consideration" if the agency departs from it. *Simon v. Simmons Foods, Inc.,* 49 F.3d 386, 389-90 (8th Cir.1995).

II. UNSAFE AND UNSOUND BANKING PRACTICES

A. Change in Bank Control Act Violations

We consider first whether the individual petitioners violated the CBCA by acting in concert in the issuance and purchase of 7,000 new shares of Capital Bank without obtaining prior regulatory approval. The CBCA provides:

> (1) No person, acting directly or through or in concert with one or more persons, shall acquire control of any insured depository institution through a purchase ... of voting stock of such insured depository institution unless the appropriate Federal banking agency has been given sixty days' prior written notice of such proposed acquisition....

12 U.S.C. § 1817(j)(1). The control of a bank is "the power, directly or indirectly, to ... vote 25 per centum or more of any class of voting securities of an insured depository institution." 12 U.S.C. § 1817(j)(8)(B). The FDIC found that all of the petitioners violated the CBCA.

1. Petitioners Donohoo, Mathies, Godbout-Bandal, and Rasmussen

Donohoo and Mathies were the primary actors in the issuance, sale, and purchase of the new Capital Bank shares and the subject of the FDIC's prohibition order. The ALJ found that in May 1988, they purchased 24.9% of the outstanding stock of Capital Bank's holding company, Capital City Corporation (CCC) from George Heaton. Heaton had purchased 99% of CCC from the Wenzel family in 1981 for consideration that included an $800,000

note Heaton was obligated on to the Wenzels (Wenzel note). In addition to the shares, Donohoo and Mathies purchased an option to buy the rest of Heaton's CCC shares for $1,025,000, financed by loans of $500,000 from Midway Bank (Midway loan) and $127,680 from People's State Bank in Winthrop, Iowa, and by assuming $400,000 liability on the Wenzel note. Following the purchase, Donohoo and Mathies became directors and officers of both CCC and Capital Bank. By January 1989, Donohoo and Mathies controlled Capital Bank's board of directors after replacing the previous directors with their own selections. Godbout-Bandal became involved in the effort to gain control of the bank as an investor in the attempt by Donohoo and Mathies to purchase a majority interest in CCC in 1988 and 1989. Rasmussen was a director, executive officer, and principal shareholder of Capital Bank.

[1] [2] We believe that, with respect to the individual petitioners, the FDIC properly interpreted the CBCA, and substantial evidence on the record as a whole supports the FDIC's finding that individual petitioners acquired control of Capital Bank through a concerted effort in violation of the CBCA. The percent of Capital Bank's shares acquired by petitioners in sum exceeded the statutory definition of control.[1] The individual petitioners argue that there is no evidence of their "acting in concert" to acquire control of the bank because there was no formal agreement between

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[1]Donohoo and Mathies purchased 2,100 shares or 15.2% of the bank's shares. Field and Godbout-Bandal each bought 2,100 shares or 15.2%. Rasmussen purchased the remaining 700, which equalled approximately 5%. In total, the group purchased approximately 50.6% of the bank's outstanding shares.

them--such as a proxy assignment, purchase and sale agreement, voting agreement, cross-pledge, collateral guaranty, or cross-guaranty--and because the individual petitioners did not all know every other investor. These findings are not prerequisites for a determination that the group acted in concert. Even absent a formal agreement, the shares of individuals may be considered together for determining control. *FDIC v. D'Annunzio,* 524 F.Supp. 694, 699 (N.D.W.Va.1981); *see also Wellman v. Dickinson,* 682 F.2d 355, 363 (2d Cir.1982) (to find concerted effort, an agreement need not be written and may be informal, and group activity may be proven circumstantially); *SEC v. Savoy Indus.,* 587 F.2d 1149 (D.C.Cir.1978). Further, persons acting in concert need not know each other. *Blumenthal v. United States,* 332 U.S. 539, 557, 68 S.Ct. 248, 256-57, 92 L.Ed. 154 (1947). Not only would petitioners' approach contradict statutory support for findings based on circumstantial evidence, it would also limit the effect of the CBCA to only the least sophisticated perpetrators of illegal bank takeovers.

Evidence supporting the FDIC's conclusion that the individual petitioners worked in concert abounds. Beginning in May 1988, Donohoo and Mathies established the investment group that included Godbout-Bandal and Rasmussen to finance the exercise of their CCC stock options, and the money invested came primarily from loans to the investors from Capital Bank. When foreclosure on the loan for which Capital Bank's stock served as collateral could not be stalled any longer, Donohoo and Mathies decided to issue new stock in Capital Bank and sell it directly to the members of their investment group. Donohoo and Mathies knew all of the participants in the

plan prior to its genesis. Although the previous, unsuccessful effort by individual petitioners to acquire Capital Bank's holding company would not support a finding of concerted effort by itself, combined with other evidence on the record,[2] it provides circumstantial evidence of the group's intent to gain control of Capital Bank. *See Wellman,* 682 F.2d at 363; *cf. Herman & MacLean v. Huddleston,* 459 U.S. 375, 390 n. 30, 103 S.Ct. 683, 692 n. 30, 74 L.Ed.2d 548 (1983) ("circumstantial evidence can be more than sufficient" in civil cases).

Donohoo's acknowledgement that the CBCA applied to the Capital Partners effort and his statement that the group had "gotten together" to save Capital Bank through the stock issuance and purchase[3] further reveal that individual

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[2]Petitioners called their effort to purchase Capital City Corporation "Capital Partners." Capital Partners is also the title of a demand deposit account at Midway used by Mathies and Donohoo to deposit investments made by the group and to make payments on the Midway loan and the Wenzel note. Although petitioners argue the naming of the account had no significance, the FDIC found that the name and use of the account showed a common scheme among the investors, who surely intended to get something in return for their financial contributions. The Capital Partners Account accompanies a volume of evidence supporting the FDIC's findings.

[3]On December 28, 1989, Donohoo advised the FDIC by letter of his plan to recapitalize Capital Bank once the "change in control has been approved" under the provisions of the CBCA. (Letter from Donohoo to the FDIC (December 28, 1989).) While testifying at the administrative hearing, Donohoo indicated that they were "[a]cting together," (Trial Tr. at 1573), and described the stock purchasers as "a group of guys that have gotten together" to "save" the bank, (Trial Tr. at 1475-76.) In addition, documentary evidence obtained from a loan file at Midway Bank showed that Donohoo and Mathies advised Midway that they had a group of investors who were interested in purchasing control of Capital Bank.

petitioners intended to act in concert to acquire control of the bank. Most of the individual petitioners accepted financing from Capital Bank or its affiliates, which were controlled by Donohoo and Mathies, in close proximity to their purchases of "investment units" in Capital City Corporation from Donohoo and Mathies.[4] Prior to the sale of the 7,000 new Capital Bank shares, the FDIC indicated its belief that the group was acting in concert, and warned individual petitioners that their purchase of the shares would violate the CBCA. Nonetheless, they proceeded with the purchase. Moreover, after the individual petitioners held the new shares for almost two-and-a-half years, they sold the shares collectively as a "majority

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[4]On November 18, 1988, Capital Bank loaned $76,000 to Leonard C. Misenor's parents. The same day, Misenor, who was an executive officer of Capital Bank, transferred $73,000 to Donohoo and Mathies for an "investment unit." Misenor is not a petitioner in this action. Charges against Misenor were withdrawn following a settlement between Misenor and the FDIC.

On December 20, 1988, Brooks Hauser purchased an investment unit for $50,000. Four days later, Capital Bank renewed a $400,000 loan to Hauser, who was a director of Capital Bank. On January 20, 1989, the bank's board, Donohoo, Mathies, Rasmussen, and Hauser, reaffirmed a $650,000 line of credit for Hauser. The next Monday, Hauser transferred $96,000 to Donohoo and Mathies for an investment unit. Hauser is not a party to this action. Hauser did not participate in the issuance, sale, and purchase of the new Capital Bank shares because he had consented to an order prohibiting him to participate in the affairs of a federally-insured financial institution issued by the Office of Thrift Supervision in early 1990.

Several other improper loans were made to the members of the Capital Partners group, particularly to the individual petitioners in this case. *See infra* note 8 and Part II.B.1.

interest," making a substantial profit.[5]

[3] [4] Individual petitioners alternatively argue that they are shielded from liability for CBCA violations by their reliance on counsel's advice in proceeding with the purchase of the new Capital Bank shares despite the FDIC's warning. This argument similarly fails. A person may not willfully and knowingly violate the law and escape liability by claiming to have followed the advice of counsel. *Williamson v. United States,* 207 U.S. 425, 453, 28 S.Ct. 163, 173, 52 L.Ed. 278 (1907); *United States v. Poludniak,* 657 F.2d 948, 959 (8th Cir.1981). Although petitioners argue that they did not act willfully or knowingly in violating the CBCA, the record supports the FDIC's finding that petitioners were aware of the illegality of their actions after receipt of a clear warning of the FDIC's position that the stock purchase violated the CBCA.

[5] Petitioners also contend that they should escape punishment entirely or receive de minimis sanctions for CBCA violations because they acted to save Capital Bank and saved taxpayers millions of dollars. This argument does not relate to whether the FDIC properly found CBCA violations. The requirements of the CBCA are straightforward. The condition of a bank or the motives of prospective stock purchasers may be relevant in determining whether to grant approval for a change in control of the bank, but they do not bear on the issue of whether the provisions of the CBCA were violated.

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[5]Donohoo and Mathies each realized a gain of $925,554, Rasmussen made $23,608, Godbout-Bandal made $120,800, and Field made $295,012.

Finally, individual petitioners claim that they should be spared sanctions for their conduct because they paid a fair price for the Capital Bank shares and because they offered to rescind the transaction when the FDIC indicated it would challenge the purchase. Although the FDIC found that individual petitioners paid less than book value for the shares,[6] the finding is irrelevant as to whether petitioners violated the CBCA. Likewise, the fact that petitioners offered to reverse the stock sale and purchase provides no additional pertinent information other than to demonstrate that petitioners were belatedly willing to appreciate the legal determination of the FDIC after the threat of sanctions became imminent.

2. Petitioner Field

Petitioner Wayne C. Field separately appeals from the order of the FDIC. Field, like Godbout-Bandal, was an investor in the attempted takeover of CCC prior to his purchase of new shares of Capital Bank. He claims that, regardless of whether the other individual petitioners violated statutory or administrative regulations, the FDIC had no basis for finding that he had done so. Field argues that because his role in the matter was simply that of an innocent investor, he was not guilty of violating the CBCA. We uphold the FDIC's order with respect to Field.

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[6]The 7,000 shares of new stock were issued on July 30, 1990. The price was $142.86 per share. As of that date, the book value of the then outstanding stock was $328.71 per share. Immediately after the issuance of these new shares, the value of the existing shares was reduced to $231 each, while the value of the newly issued stock increased to $231 per share.

[6] Reviewing the FDIC's order under the same standard as articulated above, the record on the whole provides enough evidence to support the FDIC's finding that Field participated in the effort to gain control of Capital Bank in violation of the CBCA. The FDIC adopted the ALJ's findings that Field had extensive experience in banking, that he was aware of the CBCA, and that he knew that the acquisition of the bank was subject to regulatory approval. Statements by Field recognizing the CBCA's applicability to the transaction strongly support those conclusions.[7] The FDIC also relied on evidence of Field's participation in previous attempts by Donohoo and Mathies to gain control of Capital Bank and acceptance of improper loans from the bank in the process.[8] Moreover, Update Reports from Capital Bank and other correspondence between petitioners gave Field notice that the group would be purchasing a majority of Capital Bank's shares and that

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[7]In a September 14, 1989 letter to Leonard Misenor, Mr. Field stated:

> As to my investment in Capital Bank stock this is subject to the Change of Control of ownership in the Bank, I made an investment at the time, if control is approved I expect to be issued stock.
>
> (Letter from Wayne Field to Leonard C. Misenor (Sept. 14, 1989).)

[8]On November 14, 1988, the day before Midway Bank would have foreclosed on Capital Bank for a default on the Midway loan, Field took out a $256,000 loan from Capital Bank. He then transferred $73,000 to Donohoo and Mathies for an investment unit.

On April 7, 1989, Field borrowed an additional $434,000 from Capital Bank, including $234,000 to renew his previous loan and a $200,000 advance. The same day he transferred $60,000 to Donohoo and Mathies for an investment unit.

such a purchase would require administrative approval.

B. REGULATION O VIOLATIONS AND OTHER UNSAFE AND UNSOUND BANKING PRACTICES

In addition to violating the CBCA, the FDIC found that the individual petitioners violated Regulation O[9] by obtaining insider loans on several occasions and that the loans were made on preferential terms with inadequate collateral and with an above-normal repayment risk. It also found that Capital Bank's board of directors, controlled by Donohoo and Mathies, authorized employment agreements and bonus payments for Donohoo and Mathies that constituted unsafe and unsound banking practices and exposed Capital Bank to substantial losses. It finally found that Donohoo and Mathies made false statements to bank examiners.

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[9] Regulation O provides guidelines that apply to a bank's loans to insiders to prevent insider abuse of bank funds. It requires that insider loans be made on the same terms as extensions of credit to other bank customers, that they be approved by a majority of the disinterested members of the bank's board, and that they meet other restrictions. Regulation O is codified chiefly at 12 U.S.C. § 375b and 12 C.F.R. pt. 215. Section 375b provides in part:

(2) No member bank shall make any loan or extension of credit in any manner to any of its executive officers or directors, or to any person who directly or indirectly or acting through or in concert with one or more persons owns, controls, or has the power to vote more than 10 per centum of any class of voting securities of such member bank ... unless such loan, line of credit, or extension of credit is approved in advance by a majority of the entire board of directors with the interested party abstaining from participating directly or indirectly in the voting.

12 U.S.C. § 375b(1) (1988).

1. Insider Loans

[7] After careful review, we believe the FDIC's findings that individual petitioners caused to be made and accepted insider loans are supported by substantial evidence on the record as a whole. Regulation O at 12 C.F.R. § 215.4 specifically provides that a bank may not extend credit to officers, directors, or principal shareholders unless the extension of credit is "made on substantially the same terms ... as, and following credit underwriting procedures that are not less stringent than, those prevailing at the time" for other persons. 12 C.F.R. § 215.4 (1988). In addition, the loan must be approved by a majority of the disinterested directors. *Id.*

The FDIC found that a November 18, 1988 loan to Leonard Misenor, an officer of Capital Bank, was not made on substantially the same terms as loans to others and that the proceeds were then used for Donohoo's and Mathies' benefit to reduce their indebtedness on the Midway loan and the Wenzel note. Moreover, no provision was made for periodic payment of principal, the collateral was inadequate, and the proceeds were not used for the intended purposes.

The FDIC found that an unsecured loan to Bruce A. Rasmussen in the sum of $100,000 by People's Bank, which was controlled by Donohoo, violated Regulation O because it exceeded five percent of the capital and unimpaired surplus of People's Bank and did not receive prior approval of a majority of the People's Bank Board of Directors. It further found that the proceeds of the loan were used to purchase stock in Capital Bank and that this

purchase benefited Donohoo.

The individual petitioners concede that a July 25, 1990 loan to the Pentagon Parks Association (PPA) in the sum of $480,000, of which $200,000 was used by Godbout-Bandal to finance her purchase of stock in Capital Bank, violated section 215.4(a)(1) of Regulation O. They assert, however, that any penalty should be de minimis because the violation was inadvertent, resulted in no loss to Capital Bank, and was immediately corrected. They also urge us to consider the lack of any history of similar violations by Godbout-Bandal. The FDIC found that the loan to PPA violated the CBCA through attribution to Donohoo and Mathies and constituted an unsound and unsafe banking practice as an attempt to use capital from Capital Bank to give the bank a capital infusion.

The FDIC found that loans to Field violated section 215.4(b) of Regulation O because each of the loans exceeded five percent of Capital Bank's capital and unimpaired surplus, did not receive prior approval of a majority of the board of directors, and were used for purposes other than stated in the credit file--to purchase stock in Capital Bank. Field's argument that he was only drawing on an existing line of credit is not supported by the record. The only evidence supporting the existence of a line of credit was Field's own testimony and a letter referring to an expired line of credit to Field. Moreover, Field had insufficient funds in his accounts at the time of his purchases of CCC investment units without the infusion of funds from Capital Bank.

2. Employment Agreements and Bonuses

[8] We believe that the FDIC finding that Donohoo, Mathies, and Rasmussen engaged in unsafe and unsound banking practices in creating employment agreements and bonuses for Donohoo and Mathies was supported by substantial evidence on the record as a whole. On May 25, 1989, the Capital Bank board of directors--consisting of Donohoo, Rasmussen, and Brooks Hauser--authorized employment agreements with Donohoo and Mathies. Among other provisions, the original agreement and its amendments required Capital Bank to pay Donohoo and Mathies an amount equal to twice their highest annual salary plus bonuses and benefits if they were terminated for any reason other than breach of fiduciary duty. The agreements also required Capital Bank to pay them a total of $370,000 upon change in control of the bank. The agreement, after its amendment, exposed the bank to a potential liability of $630,000 or 22% of the bank's capital. On July 13, 1990, Donohoo and Mathies caused Capital Bank to pay each of them a bonus of $10,000. The bonuses were not authorized by the board of directors of the bank and were used by Donohoo and Mathies to help fund their purchases of stock in the bank.

3. Misrepresentations to Bank Examiners

[9] We believe substantial evidence on the record as a whole supports the FDIC finding that Donohoo and Mathies intentionally deceived federal and state bank examiners with respect to the purpose, use, and terms of a loan transmitted to Leonard Misenor in their effort to obtain control of CCC. The FDIC found that Donohoo knew the purpose and use of the loan, as well as the preferential terms given to Misenor; and he omitted the loan from its proper reporting locations on the Officer's

Questionnaire associated with the 1989 examinations of Capital Bank's operations. Further, the FDIC found that both Donohoo and Mathies allowed Misenor to misrepresent the purpose of the loan to FDIC examiners on two occasions and improperly assisted Misenor in improving the condition of the loan to avoid a "substandard" rating for bank examination purposes.

C. THE FDIC SANCTIONS

Based on the violations it found, the FDIC ordered each of the individual petitioners to pay civil money penalties, prohibited Donohoo and Mathies from participating in future banking activities, and assessed other penalties.[10] We hold that the findings of the FDIC on these matters are supported by substantial evidence on the record as a whole and that the remedies imposed on the individual petitioners are within the informed discretion of the FDIC.

Our circuit has recognized that Congress strengthened

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[10]The FDIC also directed the individual petitioners to cease and desist from violating the CBCA and engaging in self-dealing and ordered them to reimburse Capital Bank for legal fees paid to Lindquist & Vennum and Rasmussen & Associates on behalf of the individual petitioners.

[10]Petitioners called their effort to purchase Capital City Corporation "Capital Partners." Capital Partners is also the title of a demand deposit account at Midway used by Mathies and Donohoo to deposit investments made by the group and to make payments on the Midway loan and the Wenzel note. Although petitioners argue the naming of the account had no significance, the FDIC found that the name and use of the account showed a common scheme among the investors, who surely intended to get something in return for their financial contributions. The Capital Partners Account accompanies a volume of evidence supporting the FDIC's findings.

the FDIC's already strong enforcement powers in the Financial Institutions Recovery, Reform and Enforcement Act of 1989, Pub.L. No. 101-73, 103 Stat. 183 (1989) (FIRREA). *Oberstar v. FDIC,* 987 F.2d 494, 499 (8th Cir.1993). Through its congressionally granted powers, the FDIC may prohibit further participation in the banking industry if an institution-affiliated party has: (1) violated a law, regulation, cease-and-desist order, or participated in an unsafe or unsound practice or breached a fiduciary duty; (2) as a result, exposed a bank to financial loss, caused prejudice to the bank's depositors, or received financial or other benefits; and (3) committed the violation, practice, or breach with personal dishonesty or a willful or continuing disregard for the safety or soundness of the bank. 12 U.S.C. § 1818(e)(1) (1988). The FDIC may also impose significant civil monetary penalties on institution-affiliated parties for violations based on the gravity of the violation and other limitations. 12 U.S.C. § 1818(i)(2)(A)(D) (1988).

1. The Prohibition Order

[10] To support its order prohibiting Donohoo and Mathies from further participation in the banking industry, the FDIC must show substantial evidence of their misconduct, the harm or threat of harm to the banking institution, and culpability on the part of the prohibited parties. The FDIC's above findings, which are properly supported by the record, demonstrate that Donohoo and Mathies engineered an effort illegally to gain control of a federally-insured bank. Moreover, in their effort, Donohoo and Mathies participated in several Regulation O violations and other unsafe and unsound banking practices, many of which were designed to profit them directly.

The record properly supports the findings that Donohoo and Mathies were aware of the wrongfulness of their actions and disregarded the likely detrimental effect on Capital Bank. Therefore, the FDIC's prohibition order with respect to Donohoo and Mathies was authorized under 12 U.S.C. § 1818(e).

2. The Cease-and-Desist Order

[11] Under 12 U.S.C. § 1818(b)(1), the FDIC may order a qualified party to cease and desist from activities that are unsafe and unsound with respect to a federally-insured bank, or from violating other laws or FDIC orders. As our circuit has recognized, the FDIC need only show proof of misconduct to exercise its power to order a party to cease and desist from that misconduct. *Oberstar,* 987 F.2d at 502. We believe that, after conducting the proper procedures for notice and hearing under the statute, the FDIC properly issued the cease-and-desist order with respect to all of the individual petitioners.

[12] With respect to the law firm petitioners, we do not find substantial evidence on the record as a whole to support the FDIC's finding that the law firm petitioners acted knowingly or recklessly in the commission of unsafe and unsound banking practices. On the contrary, the scant evidence on this issue shows that the attorney for Capital Bank was without knowledge of critical facts or deliberately misled about those facts when issuing his advice regarding the transactions related to this action. We therefore refuse to enforce the FDIC's cease-and-desist order as it relates to the law firm petitioners.

3. The Civil Monetary Penalties

The FDIC's authority to impose civil monetary penalties on institution-affiliated parties of up to $1,000,000 per day rises from three statutory provisions. The provisions differentiate the FDIC's ability to impose sanctions based on the level of culpability properly attributed to the offending party. Under 12 U.S.C. § 1818(i), the FDIC is empowered to impose monetary penalties generally. Violators of the CBCA may be assessed monetary penalties under 12 U.S.C. § 1817(j)(16), while violators of 12 U.S.C. § 375b and Regulation O may be similarly penalized under 12 U.S.C. § 1828(j)(4). After giving notice and conducting the proper hearing, the FDIC may assess civil monetary penalties for the above infractions, taking into account statutorily-recognized mitigating factors. *See* 12 U.S.C. § 1818(i)(2)(G).

[13] The FDIC Board adopted civil monetary penalties that both required the individual petitioners to pay the amount each received from the illegal takeover of Capital Bank and a penalty recommended by the ALJ.[11] Despite various objections raised by the individual petitioners, we believe the FDIC properly considered all mitigating factors and properly calculated the amount of profit received by each individual petitioner. The penalties assessed by the FDIC are therefore substantially supported by evidence on the record as a whole and based on proper interpretations

[11]The ALJ initially recommended that the individual petitioners reimburse Capital Bank for the profit they received on its stock. The FDIC Board properly determined that the reimbursement would provide an unwarranted windfall to the bank's new owner, and therefore ordered the amount of profit to be paid in civil monetary penalties.

of the relevant statutory provisions.

4. Loan No. 4100-29836

[14] The FDIC further ordered petitioner Rasmussen to pay the unpaid balance of and interest on Loan No. 4100-29836 drawn from People's Bank on July 30, 1990. We believe the FDIC's findings are substantially supported by evidence on the record viewed as a whole, and its order is not arbitrary, capricious, or otherwise contrary to law.

D. THE WENZEL LAWSUIT

[15] The Lindquist & Vennum law firm represented Capital Bank in the issuance and sale of the 7,000 new Capital Bank shares.[12] As a result of the issuance and purchase of the 7,000 new voting shares of the bank stock, the Wenzel family, who had a continuing financial interest in Capital Bank, brought an action in Minnesota state court against Donohoo, Mathies, and Rasmussen; the new investors, including Field and Godbout-Bandal; and Capital Bank for breach of fiduciary duty. The law firm petitioners

[12]On July 30, 1990, Lindquist & Vennum gave an oral opinion to the bank's board of directors followed by a written opinion to the FDIC that the plan to issue the new shares would not violate the CBCA and no notice under that Act was necessary. The law firm prepared the documents necessary to issue and sell the shares. It was aware of the fact that the FDIC believed that the stock transaction would violate the CBCA, but did not change its advice to the bank or to the individual petitioners and did not advise the bank to file the required notices for a change in control. On January 28, 1991, the FDIC notified the law firm that it was prepared to recommend that civil monetary penalties be assessed against the firm for violating the CBCA. Notwithstanding the notification, the FDIC imposed no civil monetary penalties on Lindquist & Vennum for violating the CBCA.

advised Capital Bank that payment of attorneys' fees by the bank in defense of itself and of the individual petitioners who had acted on behalf of Capital Bank was proper. Both Lindquist & Vennum and Bruce A. Rasmussen & Associates accepted legal fees from Capital Bank for defending the bank and individual petitioners in the Wenzel lawsuit.

In the Wenzel suit, the jury found that Donohoo, Mathies, and Rasmussen had breached a fiduciary duty to the Wenzels; that the three acted within the scope and course of their bank employment; and that Donohoo and Mathies, as stock pledgers, breached a separate duty to the Wenzels. The jury further found that the Wenzels were entitled to damages of $500,000 from Donohoo, $23,600 from Rasmussen, and no damages from Capital Bank.

Thereafter, the state court entered a judgment notwithstanding the verdict against Capital Bank, as well as Donohoo and Mathies, based on the jury's finding that Donohoo and Mathies acted within the scope of their employment with Capital Bank when they breached their duty to the Wenzels. The court further held Capital Bank vicariously liable to the Wenzels because the bank benefited from the infusion of capital resulting from the issuance and sale of the new shares. After the FDIC rendered its opinion that the indemnification by Capital Bank of the individual petitioners was improper, the Minnesota Court of Appeals affirmed the finding of joint and several liability against Donohoo, Rasmussen, and Capital Bank. It held that the jury's finding that Donohoo and Mathies were acting within the scope of their employment with the bank sufficiently justified the district court's order for judgment notwithstanding the verdict. The law firm petitioners

represented all defendants before the state court and the appellate court with Capital Bank paying all attorneys' fees associated with the case.

On September 9, 1992, the FDIC issued notice of charges and a temporary cease-and-desist order prohibiting Capital Bank from indemnifying the individual petitioners in the Wenzel lawsuit, prohibiting the individual or law firm petitioners from accepting any proceeds from Capital Bank indemnifying the individual petitioners, and requiring the individual petitioners to reimburse Capital Bank for the bank's expenses incurred in defending itself in the Wenzel lawsuit. The individual and law firm petitioners filed an action in the United States District Court to stay the FDIC's temporary cease-and-desist order. The district court granted the stay only insofar as the order required the individual petitioners to reimburse Capital Bank for the bank's expense in defending itself in the action.[13]

Following an evidentiary hearing, the ALJ in the FDIC proceedings recommended only that the law firm petitioners be ordered to cease and desist from representing Donohoo and Mathies on their counterclaims in the Wenzel lawsuit and to reimburse Capital Bank for any legal fees expended on the counterclaims. He refused to recommend that the law firm petitioners refund the legal fees that had been paid by Capital Bank for representation in the Wenzel lawsuit.

The FDIC rejected the ALJ's findings on this matter,

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[13]The district court did not, however, prohibit the FDIC from ordering the individual petitioners to reimburse the bank after an administrative hearing on the issue. The court concluded that ordering the payments was improper in the context of a temporary order drafted *ex parte*.

however, finding that the law firm petitioners knowingly and/or recklessly participated in breaches of fiduciary duties and unsafe or unsound practices in connection with Capital Bank's indemnification of the individual petitioners and by accepting *all* legal fees and expenses from the Wenzel lawsuit *solely* from Capital Bank.[14] The FDIC ordered the law firm petitioners to refund all legal fees paid by Capital Bank. It based its decision on its finding that the law firm petitioners were "institution-affiliated parties" that had knowingly or recklessly participated in a violation of law that caused more than a minimal financial loss to a bank. 12 U.S.C. § 1813(u)(4).[15] The FDIC further found that the violation of law involved an opinion of the law firm petitioners that indemnification of the individual petitioners by Capital Bank was proper without knowing or determining whether Capital Bank had complied with

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[14]The legal fees paid by Capital Bank in the Wenzel lawsuit amounted to $260,866, including fees generated by the counterclaims brought by Donohoo and Mathies.

[15]12 U.S.C. § 1813(u)(4) defines the term "institution-affiliated party" to include:

> (4) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in--
>
> (A) any violation of any law or regulation;
>
> (B) any breach of fiduciary duty; or
>
> (C) any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or significant adverse affect on, the insured depository institution.
>
> 12 U.S.C. § 1813(u)(4)(1988).

section 300.083 of the Minnesota Statutes. Under that section, the determination of eligibility for indemnification must, under certain circumstances, be made by "special legal counsel."[16] Minn.Stat. § 300.083, subd. 6(3) (1985). The FDIC made no finding with respect to any other violations of law.

On appeal, the law firm petitioners primarily argue that the FDIC erred in holding that the law firm petitioners knowingly or recklessly violated a law or participated in breaches of fiduciary duty and unsafe or unsound practices.[17] The decision of the FDIC is premised on its belief that the real parties in interest in the Wenzel lawsuit were the individual petitioners rather than Capital Bank.

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[16]The statute provides:

> All determinations whether indemnification of a person is required ... and whether a person is entitled to payment or reimbursement of expenses ... shall be made:
>
> (3) (If a quorum of non-party directors, or a majority vote of two or more non-party members of a board committee designated by a majority of the board cannot be reached) by special legal counsel....
>
> Minn.Stat. § 300.083, subd. 6(a) (1985). "Special legal counsel" is "counsel who has not represented the corporation or a related corporation, or a director, officer, employee, or agent whose indemnification is in issue." Minn Stat. § 300.083, subd. 1(e) (1985).

[17]In addition to its primary claim that the FDIC erred in interpreting the law at issue, Lindquist & Vennum claims that its right to due process of law was violated. Because we agree that the FDIC erred in its application of the Minnesota statute, we need not reach the law firm's due process claim.

Certainly the individual petitioners--particularly, Donohoo, Mathies, and Rasmussen--were real parties in interest. Capital Bank, however, was also a defendant in the Wenzel action and, as the Minnesota state court determined, was subject to vicarious liability because Donohoo and Mathies acted within their scope of employment for the benefit of Capital Bank. *Wenzel v. Mathies,* 542 N.W.2d 634, 642 (Minn.Ct.App.1996). Although the FDIC issued its decision before the Minnesota Court of Appeals did, the fact remains that Capital Bank had been joined as a defendant in the Wenzel action, and the law firms reasonably determined that Capital Bank could be subject to joint and several liability with respect to the Wenzel lawsuit.

Therefore, there is no merit to the FDIC's claim that the law firm petitioners knowingly or recklessly ignored the district court's order. In fact, at the hearing on the matter, the district court recognized that legal fees might well be paid by Capital Bank in its own defense with the secondary effect of benefiting the individual petitioners. We thus reject the FDIC's findings and adopt those of the ALJ on this issue.

There remains the question of whether the cited Minnesota statutes were violated. We think not. Had indemnification occurred, the statutes would obviously have been violated because there was no special counsel as that term is defined in the statute. But here, because the expenditures made by the law firm in defense of the Wenzel lawsuit were for the benefit of Capital Bank, the state indemnification statutes did not become operative. Capital Bank was not a nominal defendant, but rather it had a real interest in the outcome of the lawsuit.

The FDIC relies on *Cavallari v. Office of Comptroller of Currency*, 57 F.3d 137 (2nd Cir.1995), to support its position. We do not believe that case is particularly helpful. In that case, the court found that Cavallari, a lawyer, recklessly asserted that an exchange of guaranties was in the best interest of one of the parties without considering whether the exchange violated a temporary cease-and-desist order issued by the Office of Comptroller of the Currency against the bank. *Id.* at 142-43. It found that Cavallari: (1) gave no consideration to whether an exchange of guaranties contravened the terms of the temporary cease-and-desist order of which he was aware; (2) made no effort to ascertain the actual liability exposure of the release guarantors or the worth of the alternate guaranties; and (3) was aware that an officer of the corporation, who substituted his own corporation's guaranty for the personal guaranties of friends and family members, was under investigation relating to several fraudulent transactions. *Id.* Here, the law firm petitioners reasonably decided that Capital Bank would be subject to joint and several liability if the Wenzels were successful in their lawsuit. We therefore refuse to enforce the order of the FDIC insofar as it requires the law firm petitioners to refund to Capital Bank all of the fees it charged Capital Bank for representation in the Wenzel lawsuit. We modify the order requiring the individual petitioners to reimburse Capital Bank for legal fees incurred in the Wenzel lawsuit to require only individual petitioners Donohoo and Mathies to reimburse Capital Bank for attorneys' fees paid solely for the counterclaims brought in the Wenzel lawsuit.

III. CONCLUSION

For the foregoing reasons, we agree with the FDIC's findings with respect to individual petitioners in the sale and purchase of the new Capital Bank shares and petitioner Rasmussen's obligation to People's Bank. We disagree with the FDIC's findings and interpretation of law regarding the law firm petitioners' role. We disagree in part and agree in part with the FDIC's findings relating to the attorneys' fees paid in the Wenzel lawsuit. We enforce the portion of the FDIC's order that imposes penalties and prohibitions upon the individual petitioners for unsafe and unsound banking practices. We also enforce the portion requiring petitioner Rasmussen to pay the outstanding balance and interest on Loan No. 4100-29836 to People's Bank, and requiring petitioners Donohoo and Mathies to reimburse Capital Bank only for attorneys' fees associated with their counterclaims in the Wenzel lawsuit. We refuse to enforce the FDIC's order as to the law firm petitioners.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3256

Richard D. Donohoo, et al.,	*	
	*	
Petitioners,	*	Order Denying Petition
	*	for Rehearing and
vs.	*	Suggestion for
	*	Rehearing En Banc
Federal Deposit Insurance Corp.,	*	
	*	
Respondent.	*	

No. 95-3284

Bruce A. Rasmussen, et al.,	*	
	*	
Petitioners,	*	
	*	
vs.	*	
	*	
Federal Deposit Insurance Corp.,	*	
	*	
Respondent.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Murphy took no part in the consideration or decision of these cases.

March 21, 1997

Order Entered at the Direction of the Court:

Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3203

Lindquist & Vennum,	*	
	*	
Petitioner,	*	
	*	
v.	*	
	*	
Federal Deposit Insurance Corporation,	*	
	*	
	*	
Respondent.	*	

No. 95-3226

Wayne Field,	*	
	*	
Petitioner,	*	
	*	
v.	*	PETITIONS FOR
	*	REVIEW OF
Federal Deposit Insurance Corporation,	*	FEDERAL DEPOSIT INSURANCE
	*	CORPORATION
Respondent.	*	

No. 95-3256

Richard D. Donohoo, Craig R. Mathies, Cheryl C. Godbout-Bandal,

Petitioners,

v.

Federal Deposit Insurance Corporation,

Respondent.

No. 95-3256

Bruce A. Rasmussen, Bruce A. Rasmussen & Associates, Ltd.,

Petitioners,

v.

Federal Deposit Insurance Corporation,

Respondent.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

The petitions for review are granted and the orders of the Federal Deposit Insurance Corp. are enforced in part, modified in part, and denied enforcement in part in accordace with the opinion.

January 8, 1997

A true copy.

ATTEST: Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of	)	
	)	
RICHARD D. DONOHOO and	)	
CRAIG R. MATHIES,	)	Docket Nos.
Individually and as officers,	)	FDIC-92-249c&b
directors, persons participating in	)	FDIC-92-250e
the conduct of the affairs and	)	FDIC-92-251e
institution-affiliated parties of;	)	FDIC-92-252k
	)	
LEONARD C. MISENOR,	)	
individually, and as an officer,	)	DECISION
person participating in the	)	AND ORDER
conduct of the affairs and an	)	
institution-affiliated party of;	)	
	)	
BRUCE A. RASMUSSEN,	)	
individually, and as a director,	)	
person participating in the	)	
conduct of the affairs and an	)	
institution-affiliated party of;	)	
	)	
CHERYL C. GODBOUT-	)	
BANDAL, WAYNE FIELD,	)	
BRUCE A. RASMUSSEN &	)	
ASSOCIATES, LTD. and	)	
LINDQUIST & VENNUM,	)	
as institution-affiliated parties of	)	
	)	
CAPITAL BANK	)	
ST. PAUL, MINNESOTA	)	
	)	

and	)
	)
CAPITAL BANK	)
ST. PAUL, MINNESOTA	)
	)
(INSURED STATE	)
NONMEMBER BANK)	)

INTRODUCTION

Notices of Intention to Remove From Office and Prohibit From Further Participation; Notice of Charges; and Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing ("Notice") were issued by the Federal Deposit Insurance Corporation ("FDIC") on September 9, 1992, against six individuals, two law firms and Capital Bank, St. Paul, Minnesota ("Capital Bank" or the "Bank"), as Respondents.[1] The FDIC seeks an order of removal from office and prohibition from further participation in the affairs of any financial institution against Richard D. Donohoo and Craig R. Mathies pursuant to section 8(e) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(e). In its Notice the FDIC also seeks civil money penalties ("CMP") against Donohoo and Mathies in the amount of $1,000,000 each, and against Cheryl C. Godbout-Bandal, Wayne Field,[2] and

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[1] Charges against Leonard C. Misenor ("Misenor") and the Bank have been withdrawn. For brevity, Respondents will be referred to by surname. Jointly they will be referred to as the "Individual Respondents" or the "Law Firm Respondents."

[2] Respondent Field appears pro se. All other Respondents are represented by common counsel. Respondent Rasmussen filed

Bruce A. Rasmussen in the amount of $750,000 each, pursuant to sections 7(j), 8(i), and 18(j) of the FDI Act, 12 U.S.C. §§ 1817(j), 1818(i), and 1828(j).[3] Pursuant to section 8(b) of the FDI Act, 12 U.S.C. § 1818(b), the FDIC also seeks an order requiring the Individual Respondents and Law Firm Respondents to cease and desist from certain unsafe or unsound banking practices and violations of law, and requiring that all Respondents take certain affirmative action including reimbursement to Capital Bank for amounts wrongfully received from Capital Bank.

The hearing of this matter was conducted on twelve days between April 20 and May 5, 1993, before Administrative Law Judge Walter J. Alprin ("ALJ"). A recommended decision ("R.D.")[4] of two hundred and

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Exceptions on his own behalf and on behalf of Bruce A. Rasmussen & Associates, Ltd.

[3] A CMP of $50,000 was originally sought against Rasmussen. When, after the issuance of the original Notice, the evidence of Rasmussen's illegal insider loan was discovered, FDIC Enforcement Counsel amended the Notice increasing this amount to $750,000.

[4] Citations to the record shall be as follows:

> to the Recommended Decision: "R.D. at _"; to the transcript: "Tr. _"; to the Respondents' Exceptions: "Resp. Exc. at _"; to the FDIC's Exceptions: "FDIC Exc. at _"; to Respondent Field's Exceptions: "Field Exc. at _"; to Respondent Rasmussen's Exceptions: "Rasmussen Exc. at _"; to the FDIC's Exhibits: "FDIC Ex. No. _"; to the Respondents' Brief: "Resp. Br. at _"; to the FDIC's Brief: "FDIC Br. at _"; to the ALJ's Findings of Fact or Conclusions of Law: F.F. No. _"; "C.L. No. _."

sixty pages was issued by the ALJ on September 7, 1994, to which the FDIC and Respondents filed Exceptions.[5] On December 22, 1994, the record was reopened and the parties were requested to provide the Board of Directors ("Board") of the FDIC with supplemental information. Timely responses to this request were made. Two subsequent reopenings of the record were required, however, to compel Respondents' compliance with the Board's request.

OVERVIEW

The Board has carefully considered this massive and complex record. The central issue for the Board is whether the Respondents "acted in concert" when they issued and purchased 7,000 new shares of Bank stock, and thus gained control of Capital Bank, without obtaining prior approval from the FDIC in violation of the Change in Bank Control Act ("CBCA"), 12 U.S.C. § 1817 (j).[6]

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[5] Respondents assert in their Exceptions that the delay of eight months between submission of final briefs and the ALJ's decision violated 12 C.F.R. § 308.08, which provides that an ALJ shall file his recommended decision "[w]ithin 45 days after expiration of the time allowed for filing reply briefs," prejudiced Respondents and deprived them of due process. Respondents' Exception is particularly unwarranted in light of the size of the record in this case and the fact that counsel took in excess of six months to brief this case. The Board finds the delay insufficient to prejudice Respondents or deprive them of due process. Respondents' additional concerns regarding the ALJ's "miscitations and omissions" can be adequately addressed by the Board, which fully reviews the record.

[6] See page 25, infra.

The ALJ has provided an extremely detailed recommendation which finds that Respondents acted in concert to violate the CBCA and engaged in numerous illegal and unsafe and unsound practices in furtherance of their overall goal of acquiring control of Capital Bank. The Board concurs that this record more than supports a finding of concerted action and violation of the CBCA. The Board also concurs in the findings of fact and conclusions of law made by the ALJ in connection with the loan transactions which financed Respondents' acquisition of control, and with certain findings regarding unsafe and unsound practices and breaches of fiduciary duty. The Board finds substantial evidence supporting the ALJ's recommendations that a prohibition order be entered against Respondents Donohoo and Mathies, that civil money penalties be ordered against all Individual Respondents and that a cease and desist order be entered as well. However, as discussed below, the Board does not agree with several of the findings of fact and conclusions of law made by the ALJ, and has determined that additional findings and conclusions are necessary. Accordingly, the Board adopts and incorporates herein the Recommended Decision except as modified below.

SUMMARY OF THE FACTS[7]

This matter arises out of the events surrounding the 1990 acquisition of control of Capital Bank by Respondents Donohoo, Mathies, Rasmussen, Field, and Godbout-Bandal, who allegedly acted in concert, pursuant to a joint scheme, aided and abetted by Law Firm Respondent

[7] The ALJ describes the details of this case in seventy-eight pages. The Board, therefore, will limit itself to a summary of the critical facts.

Lindquist & Vennum, to purchase a controlling interest in Capital Bank. In order to finance and execute their scheme, Respondents allegedly engaged in a number of illegal and improper banking transactions. Despite prior warnings from the FDIC that compliance with the CBCA was required, Respondents did not comply with the prior notice and approval requirements of the CBCA.

In May 1988, Respondents Donohoo and Mathies purchased 142,000 shares, or 24.9 percent, of Capital Bank's holding company, Capital City Corporation ("CCC")[8] from George Heaton, for $1,025,000, as well as an option to purchase the remaining shares.[9] Heaton had acquired the CCC stock from the Wenzel family in 1981 and still owed approximately $800,000 to the Wenzels (the "Wenzel Note").[10] The Wenzel Note was secured by a pledge of 100 percent of CCC's outstanding shares -- including the shares purchased by Donohoo and Mathies. Heaton was also a guarantor of an unpaid $3.9 million loan

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[8] CCC is a one-bank holding company. Capital Bank is its only significant asset. Thus, ownership or control of CCC would provide ownership or control of the Bank.

[9] A third participant in the purchase of CCC shares had a falling out with Donohoo and resigned as a director of Capital Bank and disassociated himself from Donohoo and Mathies and the takeover of the Bank.

[10] Respondents Donohoo and Mathies paid Heaton $627,680 in cash and assumed one-half of Heaton's liability to the Wenzels (approximately $400,000). The cash portion of the purchase price was financed through a $150,000 loan to Donohoo from Peoples State Bank, Winthrop, Iowa ("Peoples Bank"), and a $500,000 loan to Donohoo and Mathies from The Midway National Bank of St. Paul, St. Paul, Minnesota ("Midway").

from Midwest Federal Savings and Loan Association of Minneapolis, Minneapolis, Minnesota ("Midwest Federal"), to CCC. The Midwest Federal loan was secured by a pledge of 6,685 shares of Capital Bank (approximately 99 percent) owned by CCC (the "Bank Stock Loan").[11]

Beginning shortly after their purchase, Donohoo and Mathies sought investors to buy "investment units" to pay off the $500,000 loan from Midway which they had used to purchase their CCC shares, and also to finance the exercise of their option to purchase the remaining shares of CCC.[12] Respondents' stated intent was to obtain control of Capital Bank through ownership of CCC, Tr. 1499-1500, 2026. By fall of 1988, Donohoo was a director, chairman of the board, and president of CCC. He was also a director, vice chairman of the board, and president of Capital Bank. Although nominally hired by Capital Bank as a consultant, Mathies was in actuality serving as the chief executive officer of Capital Bank from the fall of 1988 until his election as executive vice president in May 1989. By January 1989, Donohoo and Mathies controlled Capital Bank's board of directors, having replaced independent

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[11] Capital Bank had a total of 6,750 shares issued and outstanding, of which 6,685 shares were owned by CCC. The remaining 65 shares were owned by three shareholders who took no part in these events.

[12] In a letter dated June 14, 1988, from Donohoo to Midway, Donohoo stated "[the loan from Midway] would be repaid from sale of our existing bank or more likely the contribution of additional investors/partners." FDIC Ex. No. 53. Notes in the Midway credit file dated June 27, 1988, state "Lang, Mathies and Donohoo are planning to take in several additional partners for the bank purchase and our loan will be repaid from contributions from these new investors." FDIC Ex. No. 32.

directors with their selections.[13] Donohoo and Mathies also had effective control of the day-to-day affairs of CCC after February 1990, when Mathies was added to the CCC board.

The group attempted, but failed, to acquire control of Capital Bank through control of CCC because insufficient investor funds were obtained while exercise of the option was worthwhile. First, the third original investor and other potential investors defected from the plan. Second, shortly after Donohoo and Mathies acquired their interest in CCC, Capital Bank began experiencing large losses which led to CCC's insolvency in mid-1989.[14] Facing the loss of investment contributions already made or expected, Respondents Donohoo and Mathies formed a second investor group around a nucleus of survivors from the first group.[15] Neither the first nor the second investor

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[13] At its meeting on July 20, 1988, the Bank's board of directors was informed by Donohoo that it should start considering Heaton as the former owner. FDIC Ex. No. 28f.

[14] The value of the Bank (and therefore CCC) dropped below the outstanding balance plus accrued interest of the Bank Stock Loan at Midwest Federal. Tr. 1507. FDIC Exs. Nos. 11, 12, 133. Thus, Donohoo and Mathies and the other investors in CCC faced the conundrum of either paying more than the Bank's worth to salvage their investment, or losing their investment.

[15] The first investor group consisted of Donohoo, Mathies, Godbout-Bandal, Field, Misenor, Fred Thorne, Brooks Hauser, and Robert Christianson. Thorne and Christianson died and Hauser declared bankruptcy and became subject to an Order of Prohibition pursuant to section 8(e) of the FDI Act prior to July 30, 1990. Misenor had insufficient financial resources to make further investments. Thus, four of the five members of the second investment group were the only

group exercised the option to purchase the remaining shares of CCC. From late 1988 through June 1990, Donohoo and Mathies engaged in protracted, but ultimately unsuccessful, negotiations to purchase the Bank Stock Loan from Midwest Federal and then from the Resolution Trust Corporation ("RTC"), receiver for Midwest Federal[16] which held the defaulted Bank Stock Loan. By purchasing the loan from Midwest and replacing Midwest Federal/RTC with themselves as the holder of the Bank Stock Loan, they would gain control of the Capital Bank shares collateralizing the Bank Stock Loan. Tr. 1507-8, 2026. The RTC had obtained an appraisal of $2,550,000 for the 6,685 shares of stock securing the Bank Stock Loan and was soliciting bids from parties interested in purchasing Capital Bank by purchasing the Bank Stock Loan. FDIC Ex. No. 157; Tr. 918-28. The RTC announced its desire to sell Capital Bank by the end of July 1990. FDIC Ex. No. 141. Thus, by July 1990, Respondents Donohoo, Mathies, Field, and Godbout-Bandal faced imminent loss of their considerable investment in gaining control of Capital Bank because the Wenzels, holders of a secured interest in 100 percent of the CCC stock, were threatening foreclosure, and the RTC was about to sell Capital Bank from under them.

Had the RTC sold the Bank Stock Loan, Respondents would have been left with no interest in Capital Bank, 24.9 percent interest in a worthless holding

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remaining members of the original group of eight able to participate in additional investments.

[16] The RTC was appointed receiver of Midwest Federal on October 5, 1990.

company which was about to be foreclosed upon, no employment for Donohoo and Mathies, and a continuing obligation on their part to make payments on the Wenzel Note, which was a term of their original CCC stock purchase from Heaton.[17] R.D. at 11; Tr. 1413.

At this point their investment focus shifted to acquiring direct control of Capital Bank through stock ownership, rather than secondary control of Capital Bank through stock ownership of its holding company or through purchase of the Bank Stock Loan. In a last ditch effort to salvage their investment, they obtained control in the only way left to them--by issuing a sufficient number of new shares of Bank stock to take over majority control of Capital Bank.

On June 28, 1990, at a meeting of Capital Bank's board of directors consisting of Donohoo, Mathies, and Rasmussen[18], the board directed Donohoo to call a special meeting of Capital Bank's shareholders on July 9, 1990, for the purpose of amending Capital Bank's Articles of Incorporation to increase the Bank's authorized stock from 6,750 shares to 13,750 shares.

As stated by the ALJ, "the required notice to CCC of this special meeting was given by Donohoo on June 28, 1990, no doubt acting with his right hand on behalf of Capital Bank, delivering the notice to himself by placing it

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[17] By this time Heaton, Donohoo, and Mathies had ceased making payments to the Wenzels.

[18] Rasmussen, a long-time acquaintance of Respondent Donohoo, Tr. 1651-2, was made a director of the Bank on January 11, 1989.

in his left hand in his function as president of CCC on June 28, 1990." R.D. at 33. George Heaton, owner of 75.1 percent of the outstanding stock of CCC, was not given notice of the meeting;[19] nor were the Wenzels, who had a secured interest in 100 percent of the CCC shares, the RTC or the FDIC.[20]

The special meeting of Capital Bank's shareholders was held as scheduled on July 9, 1990, and was attended only by Donohoo and Mathies. At this meeting, Donohoo, as president of CCC, voted CCC's shares of Capital Bank in favor of amending the Bank's Articles of Incorporation to more than double the number of shares of the Bank, from 6,750 to 13,750, thereby diluting the prior majority stock holdings.

The Respondents structured the stock issuance so that no Individual Respondent directly acquired 25 percent of the stock, thereby attempting to avoid creation of the presumption of control for purposes of the CBCA. See

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[19] The manner in which Donohoo voted CCC's shares was contrary to CCC's customary practice which involved calling a meeting of CCC's directors to issue a proxy to a designated individual. This would have required notifying Heaton, a director and secretary of CCC. Tr. 1527-30.

[20] The issuance of this stock was concealed from the majority shareholder of the Bank's holding company and from two creditors because Respondents knew their actions would be detrimental to the creditors and principal shareholder, who, in all likelihood would have taken measures to prevent their acquisition of control. Indeed, shortly thereafter a lawsuit was filed by the Wenzels and the holding company seeking, among other things, to undo the stock issuance. See discussion of Wenzel Lawsuit, infra.

page 25, infra.[21] Nonetheless, this record makes it clear that spearheaded by Donohoo and Mathies, but with the knowledge and cooperation of all Respondents, this group of investors acquired control of Capital Bank. They did so with the participation of Leonard Misenor,[22] and Respondents Rasmussen, Field, and Godbout-Bandal.

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[21] The following shares were purchased:

Purchaser	Shares	Percent Direct Ownership
Donohoo and Matheis	2100	15.2%
Field	2100*	15.2%
Godbout-Bandal	2100	15.2%
Rasmussen	700	5.0%
TOTAL	7000	50.6%

Because Donohoo, Mathies and Field also had an indirect ownership of Capital Bank shares through their ownership of 24.9 percent of CCC, they actually owned a greater percentage of the Bank.

*On July 30, 1990, Field purchased 2,100 new shares of Capital Bank. It is unclear from the record how Field's shares were reduced to 1,896. However, in December 1992, when the Bank was sold to Amundson, Field sold only 1,896 shares and held no other shares thereafter.

[22] The FDIC and Misenor reached a settlement of all enforcement charges stemming from the purchase of controlling shares of the Bank prior to the hearing. Misenor testified extensively confirming the allegations of the FDIC. The ALJ recognized that Misenor was "a witness who might be considered to be tainted and whose statements must be considered in light of his participation in the alleged unlawful schemes, his possible personal financial liability and his having been able to affect[sic] a settlement with the agency." R.D. at 5. Nonetheless, the ALJ found Misenor's testimony to be credible, and the Board concurs.

The 7,000 shares of new stock were all issued on July 30, 1990, and purchased by Donohoo, Shari Mathies (wife of Respondent Mathies)[23], Godbout-Bandal, Field, and Rasmussen.[24] The price was $142.86 per share. As of July 30, 1990, prior to the issuance of the 7,000 new shares, the book value of the 6,750 issued and outstanding shares of Bank stock had been $2,218,765.00 or approximately $328.71 per share. Immediately after the issuance of the new shares, the book value of Capital Bank's previously issued 6,750 shares had been reduced to $231.00 per share, while the value of the newly issued stock increased from the purchase price of $142.86 per share to $231.00 per share. The previous 99.04 percent majority stock ownership of CCC was reduced to a minority interest, while majority stock ownership of Capital Bank passed to the Individual Respondents, no one of which directly owned more than 25 percent. In December 1992, 99.52 percent of Capital Bank was sold to Lloyd Amundson. Respondents sold their 7,000 shares to Amundson for $380.91 per share.[25] FDIC Ex. No. 349.

FDIC ENFORCEMENT COUNSEL'S POSITION

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[23] It is uncontested that the shares issued to Shari Mathies are attributed to Mathies because she is his wife and Mathies paid for the shares issued to her. Tr. 2114-5.

[24] Obviously, CCC was not given an opportunity to purchase any of the new shares, although it was the largest shareholder.

[25] The remaining 6,750 shares held by the RTC as collateral for the Bank Stock Loan and the three minor shareholders were sold to Amundson at the same time for $167.27 per share. FDIC Ex. No. 349.

FDIC Enforcement Counsel claim that the Individual Respondents knew about and acted according to a preconceived plan with respect to a series of insider loans, the proceeds of which were used to finance Respondent Donohoo's and Respondent Mathies' payment of debt and Respondents' stock acquisition. They assert that Respondents violated the CBCA by failing to obtain prior approval of their acquisition of control of Capital Bank; violated Section 22(h) of the Federal Reserve Act, and Regulation O promulgated thereunder, and Section 23A ("Section 23A") of the Federal Reserve Act[26] and a cease and desist order through their abusive and hazardous insider lending practices; engaged in unsafe or unsound practices in connection with the improper payment of bonuses, golden parachute agreements, and violations of the Minnesota statute governing advance payments and indemnification payments; and breached their fiduciary duties owed to Capital Bank by, among other things, causing the issuance of new Bank stock and buying the stock at a price below fair market value. All these actions, they assert, were motivated by personal gain and not the welfare of Capital Bank.

With respect to the Law Firm Respondents, FDIC Enforcement Counsel asserts that they engaged in breaches of fiduciary duty and knowing or reckless participation in

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[26] Section 22(h) of the Federal Reserve Act, 12 U.S.C. § 375b and Regulation O, 12 C.F.R. Part 215, prohibit certain loans between a bank and its executive officers, directors and principal shareholders.

Section 23A of the Federal Reserve Act, 12 U.S.C. § 371c, prohibits certain loans between a bank and its affiliates.

unsafe or unsound banking practices in causing the Bank to bear the entire expense of the lawsuit.

THE RESPONDENTS' POSITION

Respondents maintain that there were no violations, no unsafe or unsound practices, and no breaches of fiduciary duty. The Individual Respondents testified that they did not act in concert to acquire control of Capital Bank. Donohoo and Mathies testified that they had no knowledge that Misenor, Field, or Godbout-Bandal used proceeds of loans from Capital Bank to help fund the takeover of Capital Bank. Donohoo and Mathies further testified that their actions were taken only in pursuit of the best interests of Capital Bank.

They assert that there has been no violation of the CBCA for two reasons. First, in the absence of 25 percent stock ownership by an individual, no Respondent controlled Capital Bank and therefore, control of Capital Bank did not change. Second, they argue that control did not pass to the group of Respondents. They claim there is no evidence of the group "acting in concert" because there is no proxy assignment, purchase and sale agreement, voting agreement, cross-pledge, collateral or cross guarantee, or other historical indicia of "acting in concert". Resp. Br. at 72. They claim that Respondents were simply individuals with prior financial dealings and prior common investments. Resp. Br. at 29-30.

They further assert that even if a violation of the CBCA is found by the Board, no civil money penalty can be assessed against Respondents because they were

"justified in relying upon" the advice of counsel, after "all relevant facts were fully disclosed to counsel". Id.

Because Respondents deny the FDIC's allegations concerning their awareness that Capital Bank loan proceeds were used to purchase Bank and CCC stock, they claim that none of the loan transactions are attributable to Respondents Donohoo and Mathies, and they were not violative of Regulation O or Section 23A.[27] Respondents also deny the allegations regarding unsafe and unsound bonus payments and golden parachute provisions, improper advance payments and indemnification agreements, false statements made in Officers' Questionnaires, and violations of the 1984 Cease and Desist Order between the FDIC and Capital Bank.

THE RECOMMENDED DECISION

As noted by the ALJ, there is little dispute as to the facts of this case, most of which are admitted, stipulated, or well documented. "It is the significance of each fact, and the relationship of facts, disputed by contrary testimony, which forms the basis of the controversy." (Emphasis in original.) R.D. at 2-3. He recognized that "particular care is required in parsing this mass of evidence to determine whether, in view of the testamentary disclaimers, the

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[27] Respondents admit to a single violation of Regulation O regarding inadequate documentation for Capital Bank's loan in the amount of $485,000 to one of Respondent Godbout-Bandal's partnerships, Pentagon Park Associates ("PPA"). They assert, however, that any penalty "should be de minimis as the violation was inadvertent, resulted in no loss to the Bank, was immediately corrected and there is no history of previous violations of this nature by Godbout-Bandal." Resp. Br. at 97-98.

agency has met its burden of proving the allegation by the preponderance of the evidence." R.D. at 6. With this in mind, the ALJ found that:

> these facts evince a concerted purpose, a common plan, common transactions and a common benefit, organized and carried out by Donohoo and Mathies, with the borrowers-investors' knowing participation. The purpose of the plan was to join in a common group, even if the individuals never met jointly or openly jointly concurred by agreement, for the purpose of purchasing stock control of CCC, and hence of the Bank. R.D. at 16-17.

The case turns on the credibility of Respondents, and on this issue the ALJ's findings are quite clear. A few examples of his findings will suffice:

> -- . . . it is apparent that the testimony of Donohoo and Mathies was not credible. Moreover, as each of these transactions is reviewed in greater detail, this conclusion that Donohoo and Mathies and the individual borrowers-investors-purchasers knew of the loans and of their purpose is even more compelling. R.D. at 17.

> -- . . . under the factual circumstances the testimony of Donohoo and Mathies is not merely undeserving of credibility but is completely ludicrous. R.D. at 18.

> -- Donohoo and Mathies testified they had no knowledge that Field used the loan proceeds in this manner..." However, the operative facts do not support their testimony. R.D. at 23.

Quite simply, the ALJ did not believe the testimony of the Respondents.[28] He therefore found that all Individual Respondents were aware of the requirements of the CBCA, R.D. at 12, and acted in concert to violate the CBCA. See C.L. Nos. 17 18, R.D. at 128. Based on his findings regarding concerted activity, the ALJ aggregates the stock ownership of each Individual Respondent and attributes each with the total stock ownership of all. R.D. at 41.

The ALJ also found that Respondents Donohoo and Mathies participated in a series of seven insider loans, commencing in November 1988, and continuing through July 1990, which violated Regulation O and a 1984 Cease and Desist Order entered into between Capital Bank and the FDIC. The transactions involved loans to Misenor, Field (two loans), Godbout-Bandal or her related interests, Robert Christianson, and Brooks Hauser (members of the

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[28] In addition to Donohoo and Mathies, the ALJ discredits the testimony of the other Respondents. For example, he finds that "[t]he essence of the testimony of Donohoo, Mathies, Rasmussen, Godbout-Bandal, and Kris Bandal (Godbout-Bandal's husband) is: $200,000 of the PPA Loan proceeds were used to finance a portion of the purchase of 2,100 shares of new Bank stock by Godbout-Bandal on July 30, 1990, but no one knew [it] or can explain how it happened . . . The documents, however, indicate by a preponderance of the evidence to the contrary." R.D. at 28. Even Respondent Field challenges the testimony of Donohoo and Mathies. See, Wayne Field Pro-Se Rejection of Decision of Judge Alprin at 2.

original investment group).[29] They either exceeded lending limits, were made on preferential terms, had inadequate collateral protection, presented more than the normal risk of repayment, or had other unfavorable features. See C.L. Nos. 21-27; 35-38; 47-53; 63, 64, 69. In at least five instances, the participants obtained loans from Capital Bank and transferred the loan proceeds to Donohoo and Mathies. Christianson and Hauser received extensions of credit from Capital Bank in close proximity to their investments. Donohoo and Mathies disavow any wrongdoing in connection with these loans, claiming they were either unaware of the loan itself or unaware that the monies transferred to them were the proceeds of these loans. The ALJ found, however, that the facts clearly indicate that Donohoo and Mathies knew about these loans and the purpose behind them and coordinated each of them. R.D. at 13-16. He noted that in each of the five instances where loan proceeds were used, the loan and the purchase occurred either on the same day or within a single day of each other, and that Donohoo and Mathies were not only involved with, but contemporaneously controlled both sides of, the loan transactions. They controlled the bank that made the loans and they immediately received the loan proceeds. R.D. at 16. The ALJ concludes that "the seven transactions cannot properly be viewed separately as distinct, unrelated events. They are too close in time, too much in harmony with Donohoo's and Mathies' announced intent to control Capital Bank, too conducive to saving Donohoo's and Mathies' investment, and too consistent with a common plan or scheme to be merely coincidental or isolated transactions." R.D. at 14-15.

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[29] The Christianson and Hauser loans were made in connection with purchases of CCC shares, not Capital Bank shares.

Further, the ALJ found that the loan to Respondent Rasmussen from Peoples Bank (which was controlled by Donohoo) violated the restrictions and collateral requirements for transactions between affiliates set forth in Section 23A. R.D. at 52, 231-33. The ALJ found that the payment of a $10,000 bonus to Donohoo and to Mathies in the face of criticism by the State, and in light of Capital Bank's severe capital problems was an unsafe and unsound banking practice and a breach of Donohoo's and Mathies' fiduciary duty to a problem bank. R.D. at 32, 136-37. Respondent Donohoo's false response to the Officers' Questionnaires submitted in connection with the 1989 State and FDIC examination of Capital Bank also constituted an unsafe and unsound banking practice and breach of Donohoo's fiduciary duty to Capital Bank. R.D. at 137.

Although the Board generally agrees with the determinations made by the ALJ, it disagrees with several findings made and conclusions reached by the ALJ which are discussed in detail below. The following portions of the recommended order are adopted: 1) the recommendation prohibiting Respondents Donohoo and Mathies from further participation in the affairs of a federally insured financial institution, 2) the recommendation requiring Respondents to cease and desist from unsafe and unsound banking practices and violation of fiduciary responsibilities, and 3) the recommendation requiring correction of past abuses by repayment of any outstanding loans received in violation of Reg O.

THE EXCEPTIONS

The Exceptions of each party are summarized below. The major Exceptions are discussed in detail subsequently under the "Discussion" heading. Exceptions not specifically discussed are rejected. They either simply restate previous arguments which have been adequately addressed by the ALJ, or, in light of the findings made herein, are legally deficient or tangential to the holdings of this decision.

1. Exceptions Filed by Multiple Parties.

FDIC Enforcement Counsel, counsel for Respondents, and Respondent Field all filed exceptions to the ALJ's determination to include the profits made by the Individual Respondents as a result of the sale of their Capital Bank shares in 1992 in the restitution he ordered each to make as part of his recommended cease and desist order, rather than as part of the recommended CMP order. See R.D. at 107; FDIC Exc. at 5-8; Resp. Exc. at 28, fn. 21; Field Exc. at 7.

2. Respondents' Exceptions.

Broadly, Respondents take exception to all of the ALJ's findings of fact and conclusions of law against them.[30] They contend that they did not "act in concert",

[30] Respondent Rasmussen joins the Exceptions filed by counsel on behalf of the other Individual Respondents and makes several additional exceptions. He claims that he has been denied his constitutional right to a trial by his peers and has been denied equal protection of the law. He further claims that he has been denied due process because of the incompetence, bias, and ignorance of the ALJ, because of excessive delay, because of flawed evidence, and because of recommendations that are not supported by the evidence. The Board sees no evidence on this record supporting Respondent's charges regarding "incompetence,

and that they did not violate the CBCA. They take exception to the ALJ's reliance on their attempts to purchase CCC as evidence of their acting in concert to purchase Capital Bank. Further, they take exception to the findings that they participated in violations of Regulation O and Section 23A and that they engaged in unsafe and unsound banking practices, breaches of fiduciary duty, and violations of the 1984 Cease and Desist Order. They further take exception to the ALJ's finding of the value of Capital Bank stock as of July 30, 1990, and to the ALJ's calculation of profit from the sale of Capital Bank stock.

Respondents also submitted unmeritorious procedural and substantive objections to the Board's Request for Supplemental Information.[31]

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bias, or ignorance" on the part of the ALJ. Further, Respondent has presented no evidence indicating how he has been harmed by any delays in this proceeding. Therefore, Respondent's due process claims are without merit. There is no right under the Constitution to a jury trial in an administrative proceeding. Atlas Roofing Company Inc. v. OSHA, 430 U.S. 442 (1977). The remainder of his exceptions, though more elaborately stated, simply disagree with the findings of the ALJ. Respondent Field also filed Exceptions which need not be addressed separately.

[31] Contrary to Respondents' assertion, delay in the Board's decision neither deprives the Board of jurisdiction, nor deprives them of due process. The 90-day period set forth in 12 U.S.C. § 1818(h)(1) and the regulations promulgated thereunder, 12 C.F.R. § 308.40, is not jurisdictional. Saratoga Savings and Loan Association v. FHLBB, 879 F.2d 689, 694 (9th Cir. 1989), and cases cited therein. Respondents have provided no support for their denial of due process claim and no evidence of harm. The Board's request for information regarding legal fees expended defending this enforcement proceeding is based on a statement made in Respondents' brief which raised the issue. It is therefore appropriate for the Board to seek clarification of Respondents' statement.

3. FDIC Exceptions.

With respect to the "golden parachute" provisions of the employment agreements between Capital Bank and Respondents Donohoo and Mathies, FDIC Enforcement Counsel take exception to the ALJ's conclusion that they were neither unsafe or unsound practices nor breaches of fiduciary duty.

Finally, FDIC Enforcement Counsel take exception to the ALJ's finding that in the Wenzel Lawsuit "defense of the Bank could only be accomplished by disproving any wrongdoing by the Individual Respondents, so that the Law Firms' representation of the Bank required their defense of the individual defendants," and thus that payment by Capital Bank for the defense of the Individual Respondents is appropriate. R.D. at 55, 102.

DISCUSSION

The Board concurs in the major findings and conclusions of the Recommended Decision, the most

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In a separate Response, Respondent Field asserts that the Order dismissing him as a defendant in the Wenzel Lawsuit is evidence "that Field was an innocent victim to all the charges by the FDIC." The charges filed by the FDIC against Respondent Field in this matter and the charges in the Wenzel Lawsuit are substantially different. The Notice issued by the FDIC contains charges regarding Respondent Field's violation of the CBCA, and his participation in loans which violate Regulation O. The Wenzel Lawsuit contains no such charges against Respondent Field. Therefore, dismissal of Respondent Field from the Wenzel Lawsuit has no bearing on this Decision and Order.

significant of which are that the Individual Respondents were aware of the requirements of the CBCA,[32] acted in concert to violate the CBCA, and engaged in egregious insider abuse at Capital Bank. The Board has read the testimony and has no difficulty affirming the findings of the ALJ rejecting Respondents' version of events. The Board finds Respondents' testimony to be shockingly disingenuous.

To accept Respondents' version of the events requires suspension of belief not only in the documents of record, but in one's common sense view of the world as we know it. It is simply not credible that persons as sophisticated as Respondents, with the admitted motivation of Respondents and the pressures facing them, could have been as unaware or unknowing as Respondents purport to have been. By pretending to "hear no evil, see no evil," or in the words of the ALJ, by creating "deniability," Respondents cannot escape liability. Their view that each step of each of these transactions occurred in a vacuum, never to be connected or made subject to common sense inference or conclusion, cannot be accepted.

By July 1990, Respondents were about to lose their substantial common investments. They were faced with the threat of Midway calling the loan made to Donohoo and Mathies to purchase their CCC shares, the threat of foreclosure on CCC stock by the Wenzels, the sale of the

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[32] Respondents admit that had they exercised their option to purchase additional shares of CCC, control of CCC would have transferred to them and such change in control would have required approval of the Board of Governors of the Federal Reserve System. R.D. at 10-11; FDIC Ex. Nos. 129, 132. 23

Bank by the RTC, and pressure from the regulators to add desperately needed capital to the Bank. Because they feared disapproval under the CBCA by the regulators and, perhaps more significantly, because they could not wait the required sixty days for approval, Respondents issued and purchased the new Bank shares in violation of the CBCA.

1. Restitution or Civil Money Penalty.

The only issue on which the parties agree is that any money ordered to be paid by Respondents should not be paid as restitution to Capital Bank. The ALJ concludes that the Individual Respondents were unjustly enriched as a result of their misconduct and should be required to disgorge all their ill-gotten gains. R.D. at 103. He appears, however, to have included the profits in the restitution he ordered each Individual Respondent to make to Capital Bank, rather than as part of the CMP which would be paid to the government. R.D. at 107.[33] The Board adopts the exceptions and agrees that under the specific facts of this case, restitution to Capital Bank would provide a windfall to Lloyd Amundson, who purchased Capital Bank in 1992. The ALJ's recommendation that $2,290,520 be paid by the Respondents as restitution to Capital Bank would, in effect, provide a return to Amundson of over two-thirds of the purchase price he paid

[33] There is a discrepancy in the Recommended Decision as to the amount of CMPs recommended against Donohoo, Field, and Godbout-Bandal. As discussed below, the CMPs referenced on page 141 of the Recommended Decision are adopted by the Board as the basis for its Order to Pay Civil Money Penalties. Elsewhere in his decision, however, the ALJ recommends greater CMPs against Respondents Donohoo, Field, and Godbout-Bandal. R.D. at 117, 120, and 121.

to the Individual Respondents for their 7,000 shares. There is no basis in the record for providing Amundson with such a return. However, the record does support stripping the Respondents of the fruits of their wrongdoing. Accordingly, the Board's Order increases the ALJ's recommended CMP by the dollar amount of each individual Respondent's illicit gain, as found by the ALJ.

2. Acting in Concert.

The CBCA, section 7(j) of the Act, 12 U.S.C. § 1817(j), provides in part that:

> No person, acting directly or indirectly or through or in concert with one or more other persons, shall acquire control of any insured depository institution through a purchase, assignment, transfer, pledge, or other disposition of voting stock of such insured depository institution. . . .

Section 7(j)(8)(B), 12 U.S.C. § 1817(j)(8)(B) defines control to mean:

> the power, directly or indirectly, to direct the management or policies of an insured bank or to vote 25 per centum or more of any class of voting securities of an insured bank.

Hence, the statute applies to any concerted group acting directly or indirectly in obtaining the power, to directly or indirectly control the management or policies of an insured bank or to vote 25 percent or more of any class

of voting securities of an insured bank. The R.D. correctly finds that Respondents acted in concert to obtain the power to control the management and policies of Capital Bank. R.D. at 37-40. In brief, the Board concurs with the ALJ's findings that:

> 1. Beginning in May 1988, Donohoo and Mathies actively sought to establish an investment group to finance the exercise of their holding company stock option, whereby Donohoo and Mathies, with the direct or indirect concerted action by the "investment unit" purchasers, would gain control of Capital Bank through control of its holding company.
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> 2. The Capital Partners Direct Deposit Account ("CP-DDA")[34] was the vehicle for collecting and

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[34] There is much argument in the pleadings over the significance of this account. Respondents assert that it has no significance other than as "the name of a checking account." Resp. Br. at 13. FDIC Enforcement Counsel speak of it as a partnership, presumably evidencing Respondents' concerted activity. The argument itself is totally tangential as the record contains more than adequate evidence of concerted action without it. The Board finds, however, that the circumstances surrounding the use of this account are probative of the state of mind or intention of the Respondents. All investment checks were made payable to "Capital Partners" and were deposited to the CP DDA. The checks were endorsed by Donohoo and Mathies and used to pay off debts or to purchase stock. Whether a partnership agreement existed is not necessarily relevant. By use of this account, Donohoo and Mathies were holding "Capital Partners" out to be some "entity." Investors were led to believe that they were investing in something--not merely handing Donohoo and Mathies a check to deposit and disburse as they pleased. That "something" was the Donohoo/Mathies investment group. The CP-DDA is probative of the fact that each of the investors knew they were participating in an investment group and

> funneling the funds of the investment group to pay the out standing debts of Donohoo and Mathies on their stock purchase in CCC as well as amassing the funds to exercise the stock purchase option.
>
> 3. The money so invested came primarily from loans to the investors from Capital Bank, disguised by passing the loan funds through other financial institutions.
>
> 4. When foreclosure on the Bank Stock Loan could be stalled no longer, and when simultaneously the RTC threatened to sell Capital Bank to other purchasers, and the FDIC was impatient to have Capital Bank's dangerously low capital funds increased, Donohoo and Mathies decided to issue new Bank stock and sell it directly to members of the investment group, thus giving the individual Respondents as a group a majority (not merely controlling) interest in the Bank. R.D. at 38-39.

It is in this context that the pattern of Respondents' actions must be considered.

Significantly, the ALJ recognizes, and the Board concurs, that:

> while the identities and number of those forming the group involved in concerted action as . . . individual spokes surrounding the central hub of Donohoo and Mathies, did

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knew what was expected to result from their investment. See fn. 37, infra. 26

> change, and while the modus operandi changed from indirect control through ownership of the holding company to control through direct stock ownership in Capital Bank, the intention and end sought and achieved by Donohoo and Mathies always was control over Capital Bank funded by a concerted group of co-investors. The mere fact that cross-voting or proxy agreements, buy-sell agreements or cross pledges or collateral were not employed to compel continued compliance with the common purpose does not obscure the clarity of that purpose. R.D. at 39.

Indeed, in the circumstances of this case, the absence of such agreements supports the Board's conclusion. In each effort to organize an investment group, Donohoo and Mathies courted no strangers. All of the participants were known to Donohoo and/or Mathies. Because all of the participants were "insiders," no formal documentation was necessary to obtain or compel allegiance to the group endeavor.[35] The agreement to act in concert for a common purpose of controlling Capital Bank was easily obtained voluntarily.

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[35] The solicitation was akin to a private offering; no "prospectus" was prepared and none was required by law. The use of the term "prospectus" in the pleadings and the Recommended Decision is unfortunate, if only because it adds unnecessary confusion. The "History" prepared by Respondents was not a prospectus. It did, however, serve the purpose of a prospectus in describing for prospective investor-buyers of stock the terms and expectations of the Donohoo-Mathies investment group opportunity. FDIC Ex. No. 22.

The plain language of the statute recognizes concerted action as a means of obtaining control. Respondents' assertion that documentary "indicia" of concerted action is mandatory to find concerted action is erroneous. The Board is unaware of any holding requiring documentary evidence to prove concerted action. The United States Supreme Court has stated that in civil cases "[d]irect evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 330 (1960).

FDIC Enforcement Counsel cite two CBCA cases which support the obvious conclusion that concerted action to acquire control of a bank often exists without formal agreement and, where found, requires notice to and prior approval by the appropriate Federal regulatory agency. In FDIC v. D'Annunzio, 524 F. Supp. 694, 699 (N.D.W.Va. 1981), the court combined the shares of three individuals to find that they constituted the largest single shareholder within the meaning of the CBCA even though there was no evidence of a formal voting agreement. In Mid-Continent Bancshares, Inc. v. O'Brien, Fed. Sec. L. Rep. 1 98,734 at 93,709 (E.D. Mo. 1981), the court found a violation of the CBCA although the defendants "as a group, never had the power to vote twenty five percent of Mid-Continent's common stock. . ." It found that "defendants have, from the beginning intended to acquire 'control' of Mid-Continent by exceeding the ten percent ownership level which creates a presumption of control under 12 C.F.R. § 225.7(a) and the twenty-five percent ownership level which the statute defines as always constituting control. 12 U.S.C.

§ 1817(j)(8)(B)." In discussing the CBCA the court stated that

> it was designed to provide information and regulatory review of a bank acquisition before that acquisition is consummated. Accordingly, the Act must be interpreted to mean that any person who proposes to embark on a course of conduct which could go on without interruption and result in the acquisition of control must go through the applicable notification and approval process before beginning that course of conduct. Because defendants were intent on acquiring control of Mid-Continent, they were therefore obligated to comply with the requirements of the Change in Bank Control Act before commencing their acquisition.

Mid-Continent Bancshares, Fed. Sec. L. Rep. ¶ 98,734 at 93,709.

In analogous cases involving violations of Section 13(d) of the Securities and Exchange Act, 15 U.S.C. § 73m(d)(13), it has been well established that:

> Group activity such that disclosure is required when a group owns more than 5 percent of the outstanding shares of a corporation must involve a combination in support of a common objective, but the agreement need not be written and any arrangements may be formal or informal,

> and the existence of a group may be demonstrated circumstantially.

Wellman v. Dickinson, 682 F.2d 355(2d Cir. 1982); Securities and Exchange Commission v. Savoy Industries, Inc., 587 F.2d 1149 (D.C. Cir. 1978). See also Corenco Corp. v. Schiavone & Sons, Inc., 488 F.2d 207, 217 (2d Cir. 1973); Texasgulf Inc., v. Canada Development Corp., 366 F. Supp. 374, 403 (S.D. Tex. 1973).

The record before the Board more than supports the conclusion that these Individual Respondents did act in concert, notwithstanding the absence of written documentation. First, Respondents Donohoo and Mathies admitted the intention of the initial investment group to obtain control of CCC and thus, the Bank. Second, each of the Respondents knew that Donohoo, Mathies, and Rasmussen controlled management of the Bank and were seeking to salvage their investments by obtaining majority stock control.

Significantly, the Board finds that Donohoo's own testimony acknowledges the concerted nature of the group:

> "Here is a group of guys that have gotten together, we are trying to save a bank, a bank that has been in trouble, and we have done what you have asked, we put in capital. . . (emphasis added.)" Tr. 1475-76.

Furthermore, during cross-examination regarding whether he and Mathies acted together to purchase 2,100 shares of Capital Bank on July 30, 1990, Respondent Donohoo testified:

> "Acting together -- well, we were part of a group of investors who were purchasing the stock." Tr. 1573.[36]

In addition, the record contains uncontroverted evidence of Donohoo and Mathies claiming that they and their investor group held control not just of the management and policies of Capital Bank, but of the voting shares as well. On July 13, 1990, Donohoo and Mathies sought a loan from Midway to finance their purchases of the soon to be issued new Capital Bank stock. Notes in the Midway loan file dated July 13 and 24, 1990--at least 6 days before the stock issuance--indicated who the investors in the new stock would be and that insiders would hold 52 [sic] percent of the shares and the remaining shares would be held by the holding company and "outsiders." FDIC Ex. No. 33, p. 13. That Donohoo and Mathies controlled more than just their own shares of Bank stock is further evidenced by Midway loan file notes dated January 22, 1991, indicating that the RTC had 48 percent of Capital Bank and Donohoo and Mathies had 51 percent. FDIC Ex. No. 33, p. 14.

Ample evidence supports the ALJ's determination that all Individual Respondents were part of a group formed to acquire, and which did acquire, control of Capital Bank.

Respondents' Exceptions assert that they were merely individuals with "prior common investments," Resp. Exc. at 8, and that "under the ALJ's new theory of

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[36] Donohoo and Mathies admittedly acted in concert to acquire 15.28 percent of the Bank. Answer ¶ 30(g) and (j); Tr. 2114-5.

'acting in concert,' every person who purchases stock in a financial institution must file an application for prior approval pursuant to the CBCA, because every such purchaser has or could conceivably acquire the ability or capacity to vote his or her stock as part of a group, whether or not the purchaser has any intention of doing so." (Emphasis in original.) Id. at 10-11. The argument misses the crucial point that Respondents herein did intend to act together to acquire control. The record is clear that these Respondents, by knowingly acting to form a group to gain control of Capital Bank, acted in concert within the meaning of the CBCA.[37]

Respondents complain that their due process rights have been violated because they had no notice of what the FDIC considered "acting in concert." They accuse the FDIC of "making up" the interpretation of the requirements of the CBCA and claim that because there are no previous FDIC Decisions, advisory opinions, or interpretations of the CBCA discussing "acting in concert," there was no way for Respondents to have notice of the FDIC's interpretation of the CBCA. Resp. Exc. at 3. While there is little precedent directly involving the FDIC, the concept of prohibiting certain kinds of "concerted activity" and the parameters of such prohibited activity is not new to the law and should not have been unknown to

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[37] Respondent Field asserts that he knew only Respondents Donohoo and Mathies and that therefore he could not have acted in concert with the group of investors. See Field Exc. at 5. In making this argument, however, he admits his intention to invest with Respondents Donohoo and Mathies and that is sufficient to find that he acted in concert with one or more persons. All members of a group acting in concert need not know each other. Blumenthal v. United States, 332 U.S. 539, 557 (1947).

the Bank's counsel.[38] At the very least, Bank counsel should have been aware of and not ignored the body of law discussed at pages 28-30, supra. Moreover, Respondents were warned by the FDIC that issuance of 7,000 shares of new stock was likely to be a violation of the CBCA and they were asked by the FDIC to postpone the issuance.[39] They refused to do so at their peril and indeed on the very day of the issuance Respondents Donohoo and Mathies purposely misstated to the FDIC many facts related to the stock issuance. R.D. at 112-13. Respondents' exception is rejected.

3. Respondents Allege that Their Attempts to Purchase CCC is Not Evidence of "Acting in Concert" to Purchase Capital Bank.

Respondents take exception to the ALJ's reliance on their past efforts to acquire CCC in finding that Respondents acted in concert in purchasing Bank stock.

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[38] In addition to Bank counsel Costley, Donohoo, and Rasmussen are attorneys. Tr. 1325, 1650.

[39] On the morning of July 30, 1994, FDIC Field Office Supervisor Dennis Fagerland and FDIC Examiner Brian Peters met with Respondents Donohoo and Mathies and specifically advised that the stock issuance might violate the CBCA for which civil money penalties might be assessed. Donohoo and Mathies were asked to delay the issuance until they or their counsel had discussed the matter with the FDIC's Kansas City Regional Office. They refused to delay the issuance. A letter confirming the FDIC's views was telefaxed to the Bank's board of directors and to its attorney, Costley, at approximately 1:30 p.m. that day. At 2:30 p.m. on July 30, 1990, FDIC Review Examiner Kirchoff discussed the matter by telephone with Costley, who indicated he did not know whether the stock had been issued. It had in fact been issued prior to their conversation. R.D. at 35-7.

They assert that the "purchase of Capital Bank stock involved a different entity, a different time period, some different investors, a different structure, and 48 percent less of a total interest." Resp. Exc. at 6-7. The Board finds that the purchase of Capital Bank and the attempted purchase of CCC cannot be viewed as separate transactions.[40] They are both means to the stated goal of acquiring control of Capital Bank. Indeed, the purchase of Capital Bank shares was resorted to because the group's attempt to purchase CCC failed. The ALJ's analysis of these as interrelated transactions, providing probative evidence of the history, motivation, and mechanics for the issuance of the new Bank shares and the acquisition of control in violation of the CBCA is appropriate. Respondents' exception is rejected.

4. Advice of Counsel.

Respondents argue that, if a CBCA violation is found, only a de minimis penalty is appropriate because they relied on the advice of counsel fully apprised of the facts. Respondents' theory that they were justified in relying on the advice of counsel--albeit erroneous--eviscerates the role of regulators. Under their theory, one could be shielded against prosecution, or more than de minimis civil penalties, for all manner of illegal activity by mere assertion of reliance on counsel. This, of course, is not the law. Legal advice "will not shield the client from

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[40] Respondents are charged only with violation of the CBCA in connection with their acquisition of control of Capital Bank on July 30, 1990. They have not been charged with violations in connection with a change of control of a bank holding company incident to their acquisition of shares of CCC.

civil enforcement action and would only be relevant as a mitigating factor in a civil money penalty action." H.R. Rep. No. 541, 101st Cong., 1st Sess. 1, 467 (1989) reprinted in 1989 U.S.C.C.A.N. 86, 263. (Discussion of the amendments to section 8(i) of the FDI Act by section 907 of FIRREA.) See also In the Matter of Steven J. Hirsch, et al., FDIC-91-24k, 1 FDIC Enf. Dec., P-H ¶ 5189 at A-2143 (1992).

Respondents' argument is not aided by the fact that, contrary to their pleadings, their counsel clearly was not apprised of all the relevant facts when he rendered his legal opinion.[41] Although Bank counsel, Kevin Costley, testified that had he been aware of the additional information later pointed out to him, his opinion would not have changed, the ALJ and the Board discount this testimony as totally self-serving given Costley's day-to-day involvement in the scheme, his role as a member of Respondent Lindquist &

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[41] At the time Costley gave his opinion he was unaware
-of the loan to Misenor and two loans to Field;
-of the fact that Field, Donohoo, Mathies, and Godbout Bandal were previously associated with the attempt to obtain control of CCC and that any of them had an ownership interest in CCC;
-of the loan to Rasmussen;
-of the two Bank loans to Godbout-Bandal or her related interests, and believed no financing was involved in purchasing her shares of the Bank;
-that Donohoo and Mathies had attempted to assemble an investment group to exercise the option to purchase the remaining shares of CCC and that Field and Godbout Bandal were part of that group;
-of any of the financing involved for the investments in CCC by Mathies, Donohoo, Misenor, Field, and Christianson;
-of the Capital Partners account and its use to funnel funds for debt service and stock purchases. F.F. No. 291, R.D. at 239.

Vennum, and his natural reluctance to admit to providing erroneous legal advice. The Board concurs with the ALJ's finding that based upon the July 31, 1990, letter prepared by Costley, which did not set forth accurately the factual situation known to Respondents, "none of the Individual Respondents could have reasonably relied on Costley's opinion." R.D. at 240.

5. Golden Parachutes.

Donohoo and Mathies entered into employment agreements with Capital Bank dated June 1, 1989 (the "Original Employment Agreements"), which provided generous golden parachutes if Capital Bank terminated either or both for reasons other than breach of fiduciary duty, or if either or both were terminated within one year of a change in control. F.F. Nos. 311-313. As of June 1, 1989, Capital Bank's potential liability under the golden parachutes was 8 percent of its equity capital. F.F. No. 316. The Original Employment Agreements were amended on August 1, 1990 (the "Amended Employment Agreements"), two days after Donohoo and Mathies and the Individual Respondents acquired control of Capital Bank in violation of the CBCA. The amendments sweetened the golden parachutes so that as of August 1, 1990, they represented a liability for Capital Bank of 22 percent of the Bank's equity capital. F.F. No. 320. The ALJ found that the Amended Employment Agreements "were not necessary to retain Donohoo and Mathies as officers of the Bank." F.F. No. 319. In addition, the ALJ found that both the Original and Amended Employment Agreements were authorized by Capital Bank's board of directors of which Donohoo, and later Donohoo and Mathies were members. On neither occasion did the board

discuss the terms of the agreements or their impact on Capital Bank. Neither Donohoo nor Mathies abstained from voting on the agreements, but rather, voted to approve them. FDIC Ex. Nos. 28s, 28qq; F.F. Nos. 310, 317, 318.

Other related findings of the ALJ are significant:

- Donohoo and Mathies have also engaged in unsafe or unsound practices by . . . entering into self-serving and abusive employment agreements. R.D. at 80;

- Their [Donohoo's and Mathies'] acquisition of control of the Bank in violation of the CBCA was facilitated by . . . unsafe or unsound practices committed in connection with the Employment Agreements. . . . " R.D. at 81;

- Donohoo and Mathies also engaged in abusive insider transactions . . . as evidenced by the unsafe and unsound practices involving the . . . golden parachutes. R.D. at 84;

- Donohoo and Mathies engaged in numerous acts of self dealing detailed above, including . . . arranging and voting the abusive golden parachutes for themselves. . . . R.D. at 87; and

- Donohoo and Mathies in fact engaged in the consummate pattern of insider abuse, demonstrating both willful and continuing disregard for the safety and soundness of the Bank. . . . They also contrived to give themselves employment agreements with golden parachutes that exposed the Bank to payment obligations which represented as much as 22 percent of its capital. R.D. at 93.[42]

These findings are quoted in great detail because they starkly contrast with the ALJ's conclusion that the Original and Amended Employment Agreements, with their golden parachute provisions, were not unsafe or unsound practices nor breaches of Respondents' fiduciary duty. R.D. at 57.

The Board adopts FDIC Enforcement Counsel's exception to this conclusion. The Board is unable to

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[42] At the June 3, 1988 FDIC examination, the Bank had $4.7 million in capital. FDIC Ex. No. 11. FDIC Review Examiner Kirchoff testified that at the time of the first golden parachute agreement, June 1, 1989, "Capital Bank had a composite rating of 4. It was a problem bank and was already incurring operating losses. Any additional pay-out, particularly of this amount [$340,000 or 8 percent of capital], would have had a significant impact on the bank, on the bank's condition and capital structure." Tr. 1175. He further testified that "the Bank was still designated as a problem bank" as of August 1, 1990, when the agreements were amended to require the Bank to pay approximately $630,000 or 22 percent of the Bank's capital. Tr. 1178.

reconcile the ALJ's findings of fact outlined above, which are supported by the record and appropriate, with his conclusion of law. First, this was not a voluntary business decision arrived at by disinterested managers. These agreements were conceived and presented to the Bank by the people they were designed to benefit. The minutes of the Bank's board of directors indicate that the board never reviewed the terms of these agreements or considered the impact hey could have on the already poor condition and earnings of the Bank. FDIC Ex. Nos. 28s, 28qq. Neither Donohoo nor Mathies abstained from voting approval for these benefits. Id. Second, there was no valid business reason for the golden parachutes. They were not necessary to attract Donohoo or Mathies who were already employed as officers of the Bank. Nor were they necessary to retain Donohoo and Mathies as officers. They had no legitimate job insecurity because they were in control. FDIC Ex. No. 22; Tr. 1181, 1184-85. While golden parachutes are not per se an unsafe or unsound practice, the findings made on this record lead logically and inevitably to the conclusion that these golden parachute provisions were abusive and self-serving, and that Donohoo's and Mathies' actions in connection with them were unsafe or unsound practices and breaches of their fiduciary duty to Capital Bank.[43]

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[43] Respondents argue that no payments were made under the golden parachutes and therefore the issue is moot. This is not quite accurate. While a cease and desist order regarding the golden parachutes is no longer necessary, the Agreements were abusive, self-dealing, unsafe and unsound practices imposed upon the Bank by Donohoo and Mathies. Thus, they are support for other relief ordered. Included in the price paid by Amundson to Donohoo and Mathies for their Bank stock was the amount each was entitled to pursuant to his golden parachute. Therefore, that amount has been included in calculating their illicit gain and in the CMPs issued against them.

6. Violations of Regulation O and Section 23A.

Respondents filed an exception to the ALJ's findings and conclusions with respect to alleged violations of Section 23A and Regulation O because they are based on the conclusion that Respondents acted in concert to violate the CBCA. Because the Board concurs in these findings of the ALJ regarding violation of the CBCA and the violations present in the loans to the Individual Respondents, the exception is rejected.

Respondents also filed an exception to the ALJ's findings that the loan from Peoples Bank to Rasmussen violated Section 23A and Regulation O because these findings are "based entirely upon the ALJ's conclusion that Respondents were acting in concert within the meaning of the CBCA." (Emphasis in original.) Resp. Exc. at 23.

Because of Respondent Donohoo's simultaneous service as president, officer, and director of Capital Bank, his control of Capital Bank within the meaning of Section 23A, his ownership of 50 percent of the holding company which controlled Peoples Bank, and his chairmanship of the board of Peoples Bank, Capital Bank was an affiliate of Peoples Bank for purposes of Section 23A. The unsecured loan in the amount of $100,000 arranged by Donohoo from Peoples Bank to Respondent Rasmussen, enabled Rasmussen to purchase his shares of Capital Bank. This loan is an extension of credit to Donohoo, within the meaning of § 215.3(f) of Regulation O, 12 C.F.R. § 215.3(f), because the proceeds were used for his tangible economic benefit, in that it allowed an "insider" to complete the purchase of new shares necessary to obtain

control of Capital Bank. It is also an extension of credit by an affiliate for the benefit of Capital Bank because the loan proceeds were transferred to Capital Bank's capital account, 12-U.S.C. § 371c(a)(2). FDIC-84-192el FDIC-84-211e, FDIC-85-40k (Consolidated), Bound Vol. 1 P-H FDIC Enf. Dec. ¶ 5118 (1988); FDIC-86-139k, Bound Vol. 1 P-H FDIC Enf. Dec. ¶ 5088 (1987). The loan violated the lending limitations, and prior approval and collateral requirements of Regulation O and Section 23A. FDIC-85-356e, Bound Vol. 1 FDIC Enf. Dec. ¶ 5112 (1988). R.D. at 52, 231-33. Therefore, the Board also rejects this exception.

7. Value of Capital Bank Stock as of July 30, 1990.

The ALJ finds that at $142.86 per share, Respondents did not pay fair market value for their shares of Capital Bank and "their actions with respect to the new Bank stock were performed without full and complete disclosure, and lacked fairness and arms-length dealing." R.D. at 60. Respondents filed an exception to this finding. Further, they took exception to the ALJ's finding of value because they claim it "is based upon the incorrect assumption that Respondents purchased a total of 100% of Capital Bank's stock." Resp. Exc. at 8. The Board rejects both exceptions and discusses them in reverse order.

After purchase of the newly issued shares, Respondents owned 51 percent of Capital Bank's shares and they argue that the ALJ erred in crediting testimony of the value of the shares based upon 100 percent of the shares. The argument is sophistry and it is wrong. Assuming, as Respondents do in their argument, that existing shareholders of a corporation are not to be

disadvantaged by the issuance of new shares, then the value of their shares should not change following the issuance of new shares, regardless of the percentage change of their holdings. For example, if the number of shares is diluted two for one, as it was in this case, then 100 percent of the pre-dilution shares should have the same value as 50 percent of the post-dilution shares.[44] The ALJ correctly relied upon testimony valuing 100 percent of the shares prior to dilution.[45]

The ALJ also appropriately credited the testimony of Respondents' witness, Paul Olander. Of the numerous witnesses who testified regarding valuation, all were interested parties except Olander. The testimony of Respondents Donohoo, Mathies, Rasmussen, Bank attorney Costley, and Bank purchaser Amundson, is not only plainly self-serving, but lacks any documentary support, analysis, or expertise.[46] R.D. at 68-71. Donohoo, Mathies, and Rasmussen did not obtain an independent appraisal of Capital Bank in determining the price at which stock should be issued, Tr. 2034, and never did any analysis, to set the price for the 7,000 shares, Tr. 822-23, 2033. The minutes

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[44] See, FDIC Enforcement Counsel's correct and detailed explanation at fn. 42, pp. 129-30 of their brief.

[45] The Board's concern here is not so much with the existing shareholders, whose grievances presumably will be fully addressed by the Wenzel Lawsuit. Rather, the Board is concerned with the disadvantage to the Bank caused by the failure of Respondents to properly value the stock.

[46] Not only was Costley clearly an interested party, but he was so involved in these transactions that the Board significantly discounts the value of his "expert" testimony.

of the board meetings contain no reference to the value of Capital Bank, the price at which stock-should be issued, or that Donohoo, Mathies, and Rasmussen were going to purchase a substantial portion of the stock. FDIC Ex. Nos. 28mm-qq. The record is clear that by letter dated June 1, 1990, to Midwest Federal (RTC), Donohoo and Mathies offered either to purchase the Bank Stock Loan for $1.4 million or to purchase the 6,685 shares of Bank stock securing the Bank Stock Loan at a private foreclosure sale for $1.6 million. They stated that "the purchase of the stock would be contingent only upon receipt of any regulatory approvals required to complete the purchase." FDIC Ex. No. 140. Thus, by their own admission, Respondents' testimony valuing Capital Bank at $1 million undervalued Capital Bank by at least $600,000.[47]

Although Respondents testified the stock was worth $142.00 per share, the ALJ credited the testimony of Respondents' witness, Olander, a qualified bank appraiser, that the stock was worth $348.00 per share as of December 22, 1989. R.D. at 71. The ALJ also found that the Olander appraisal was a fair approximation of Capital Bank's fair market value as of July 30, 1990, because Olander's projection of the need to add $1,190,000 to the Allowance for Loan and Lease Losses ("ALLL") was substantially accurate. R.D. at 73. The ALJ also credibly reconciled the difference between Olander's draft and final appraisal. R.D. at 72. Although the testimony cited by the

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[47] Amundson, the purchaser of the Bank from Respondents, of course has an interest in testifying that at $1 million, Respondents paid fair market value for their 7,000 shares. But even Amundson testified the shares were worth $20.10 per share more than Respondents paid. Tr. 1045-55. 43

ALJ does not on its face reconcile the draft and final appraisal (Resp. Exc. at 12), a review of the documents themselves supports the ALJ's conclusion. It is clear that the difference between the two documents is that Olander "twice deduct[ed] the dollar amount of the additional provision to the ALLL he determined necessary for a fully funded ALLL." R.D. at 72; FDIC Ex. No. 157, Resp. Ex. No. 87.

Because Respondents presented no credible evidence in support of their assertion of stock valuation except that of their own witness, Mr. Olander, the Board finds no basis in the record to disturb the ALJ's determinations as to the credibility of witnesses or other findings regarding the value of the stock, and, therefore, rejects Respondents' exceptions. "The testimony at the hearing and the various exhibits clearly established that a fair price for the 7,000 shares of new stock was more than $1,000,000, and in fact, much more." R.D. at 77.[48] Of course, if the price of the stock had been set at arm's length, the fair market value, which might well have been different, would not have been an issue in dispute.

8. Determination of Profit From the Sale of Capital Bank Stock.

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[48] The Board concurs in the ALJ's finding that the purchase price per share paid by Respondents was the function purely of the amount of capital infusion required ($1 million) divided by the number of shares required to provide the Respondents with majority control (7,000 shares). The price paid by Respondents had no relationship to actual fair market value. Tr. 2033. 44

Respondents take exception to the ALJ's determination of the profit derived from Respondents' sale of Capital Bank stock to Amundson in 1992. Respondents claim the ALJ did not include appropriate deductions to the gross profits in calculating his profit figures for the CMPs imposed. The items which Respondents claim should have been deducted from their gross profit on the sale of their Bank stock are: (1) interest paid on the money borrowed to make the initial stock purchases; (2) amounts spent on settlement of part of the Wenzel Lawsuit; (3) legal fees paid by Respondents to settle part of the Wenzel Lawsuit; and (4) $50,000 in legal defense funds provided by Amundson's purchase agreement. Resp. Exc. at 29-9.

The Board disagrees with Respondents' exception. These items are appropriately not a part of the determination of profit for purposes of the CMP imposed herein. As the courts have held in insider trading cases under the Securities Exchange Act of 1934,[49] disgorgement is a proper remedy which serves the equitable purpose of depriving a wrongdoer of all ill-gotten gains. Randall v. Loftsgaarden, 478 U.S. 647, 663 (1986); Janigan v. Taylor, 334 F.2d 781, 786 (1st Cir. 1965), cert. denied, 382 U.S. 879 (1965); Litton Industries, Inc. v. Lehman Brothers Kuhn Loeb Inc., 734 F. Supp. 1071 (S.D.N.Y. 1990) reversed on other grounds, 967 F.2d 742 (2nd Cir. 1992). The calculation of profit to be disgorged is intended to "squeeze every possible penny of profit out of such [illegal] transactions] in order to effectuate the remedial purpose of the statute." Texas International Airlines v. National Airlines, Inc., 714 F.2d 533 (5th Cir. 1983), cert.

[49] Securities Exchange Act of 1934, §§ 10(b), 16(b), 15 U.S.C. §§ 78j(b), 78p(b).

denied, 465 U.S. 1052 (1984); Blau v. Lehman, 286 F.2d 786, 791 (2d Cir. 1960), aff'd, 368 U.S. 403 (1962), citing Smolowe v. Delendao Corp., 136 F.2d 231, 239 (2d Cir.), cert. denied, 320 U.S. 751 (1943). The court in Blau also stated : "We are not . . . computing profits in accordance with what might be the custom of traders and speculators in the stock market. We are construing a federal statute . . . ." Id.

In Lane Bryant, Inc. v. Hatleigh Corp., 517 F.Supp. 1196, 1202 (S.D.N.Y. 1981), the defendant sought to reduce the amount of profit he was to disgorge by deductions quite similar to those asserted by Respondents: (1) administrative overhead expenses, (2) interest on the loans secured to enable defendant to finance the stock purchases, (3) office overhead, and (4) lawyers' fees and costs of litigation. The court rejected all of these proposed deductions:

> None of these attempted deductions is appropriate in calculating the short-swing profits. The profits on the purchases and sales are not to be equated with the costs to the defendant of doing business, nor conducting litigation seeking the control of the enterprise. It would be inappropriate to permit the bank's administrative charges for handling the defendant's account or its interest charges on loans which the defendant secured to enable it to finance the purchases to reduce the profit on the trades. The profits contemplated by the statute are profits from the purchase and sale of the securities and not any costs such as bank charges.

> office overhead or collateral litigation which a party seeking control incurs. To permit the deductions claimed would be to encourage the type of transactions from which the statute squeezes all profit to be made on the basis of third party financing of the transactions which by itself would merely multiply the problems sought to be reached [by the statute]. . . ." (Emphasis added.)

517 F.Supp. 1202.

The Board finds the analysis in these cases to be persuasive and concludes that similar analysis is applicable under the FDI Act. Therefore, the Board concludes that the ill-gotten gain to be disgorged by Respondents is the difference between the purchase price and the sales price of their Capital Bank shares. Respondents' proposed deductions are inappropriate reductions of their profit and the Board rejects Respondents' exception.[50]

Respondent Field has his own, novel formula for calculating gain on his investment in Capital Bank. He asserts that the cost of an investment is the purchase price plus "either the interest you pay on borrowed funds, or interest you lose if you do invest your own 'after-tax' dollars. FDIC is wrong when they [sic] do not factor interest expense into a gain or loss on a capital investment." Field Exc. at 4. According to Respondent

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[50] The $50,000 in legal defense funds is a specific, negotiated element of the Sales Agreement between Respondents Donohoo and Mathies and Lloyd Amundson. FDIC Ex. No. 345. It is obviously bargained-for profit, appropriately subject to being disgorged.

Field, the only gain he made is the difference between the purchase price plus what he would have made had he invested the money at current interest rates, and what he received from the sale of his shares. Id. There is no support in relevant legal analysis for the idea that in calculating profit for purposes of determining the amount to be disgorged under a remedial federal statute, only the windfall over and above the so-called normal return one would have received on his money is the proper amount. Texas Internat'l Airlines, 714 F.2d 540. Indeed, in enforcement of insider trading prohibitions in securities law, it has even been held that a trader can be made to disgorge "theoretical" profit where he has actually suffered net loss on short-swing profits. Id. at 541. Respondent Field is patently wrong and his exception is rejected.

9. Violations of 1984 Cease and Desist Order.

The ALJ's findings related to violations of the 1984 Cease and Desist Order between Capital Bank and the FDIC are based upon his discrediting of the Respondents' testimony denying any awareness of the nature and purpose of loans made to the Individual Respondents and Misenor. Respondents argue that the ALJ's findings and conclusions are erroneous. The Board has already indicated its concurrence with the ALJ's credibility findings. Additionally, the Board rejects this exception because the record is clear that the Misenor and Field loans violated the 1984 Cease and Desist Order which required the Bank to make "no extensions of credit without first obtaining . . . 3(ii) an appraisal or other evaluation of the pledged collateral, (iii) documentation necessary to perfect the Bank's lien on any pledged collateral, and (iv) file comments stating the purpose of the loan." FDIC Ex. No.

5; R.D. at 46-9. None of these requirements of the 1984 Cease and Desist Order were met.

10. Indemnification Issues.

These issues concern Capital Bank's agreement to indemnify the Individual Respondents from the costs of litigating, and any liability arising out of, the Wenzel Lawsuit challenging the issuance and sale of Capital Bank's 7,000 shares to the Individual Respondents. The Law Firm Respondents were retained to represent the Individual Respondents and Capital Bank in the Wenzel Lawsuit. For this common representation, the Law Firm Respondents submitted bills for services only to, and were paid only by, Capital Bank. FDIC Enforcement Counsel claim that indemnification of the Individual Respondents by the Bank was improper and an unsafe or unsound practice, and that payment by the Bank of all fees for the common representation of the Bank and the Individual Respondents was also improper and a breach of the fiduciary duty owed the Bank by the Law Firm Respondents. The Individual Respondents claim that their indemnification by the Bank was either mandatory or allowed under a Minnesota statute, and that it was proper for the Bank, as one of the several defendants in the Wenzel Lawsuit, to be billed for and to pay all fees and costs for the common defense. FDIC Enforcement Counsel takes exception to the ALJ's finding that "so long as the defense of the individuals is indivisible from that of Capital Bank, there is no cause to limit the Law Firm defendants [Respondents Lindquist & Vennum and Bruce A. Rasmussen & Associates, Ltd.] being retained and paid by the Bank," and his failure to order the amounts expended on behalf of the Individual Respondents and on behalf of Capital Bank restored to Capital Bank.

R.D. at 102. The Board disagrees with the ALJ, holding that the Bank's agreement to indemnify the Individual Respondents is improper and the Bank must be reimbursed for all legal fees and expenses paid, for the reasons discussed below.

a. The Wenzel Lawsuit

Prior to the issuance of the 7,000 shares of Capital Bank stock on July 30, 1990, CCC, Capital Bank's holding company, owned 6,685 shares of Capital Bank's then issued and outstanding 6,750 shares. F.F. No. 3. As of that date, George Heaton owned 75.1 percent of CCC and Donohoo and Mathies owned 24.9 percent. F.F. Nos. 4, 5, 8, 12, and 14. All of the stock of CCC owned by Heaton, Donohoo, and Mathies was pledged as security for Heaton's personal note to the Wenzels for the purchase of CCC from the Wenzels. F.F. Nos. 5 and 12. Donohoo and Mathies assumed one-half the liability on Heaton's note to the Wenzels as a term of their purchase of CCC stock from Heaton. F.F. Nos. 9 and 10. When Donohoo, Mathies, and Rasmussen orchestrated the issuance of the 7,000 new Bank shares and sold the shares to themselves and the other Individual Respondents on July 30, 1990, the book value of the 6,685 shares of Capital Bank owned by CCC was significantly reduced in value from $328.71 per share to $234.09 per share. F.F. Nos. 156 and 158. The issuance of the 7,000 shares was more significant than even the reduction of book value would indicate in that it also diluted CCC's percentage ownership of Capital Bank from 99.04 percent to 48.62 percent and transferred control of Capital Bank from CCC to the Individual Respondents. F.F. Nos. 171-173. The issuance of the 7,000 shares was accomplished without notice to Heaton, the principal

shareholder of CCC; the RTC, which, as receiver for Midwest Federal, held a security interest in CCC's 6,685 shares in Capital Bank; the Wenzels, who held all the stock of CCC as security for Heaton's note to them; or the FDIC and the Board of Governors of the Federal Reserve System. F.F. Nos. 134 and 151.

On or about October 31, 1991, the Wenzels and CCC sued Capital Bank and the Individual Respondents, alleging, among other things, that Donohoo and Mathies breached their various fiduciary duties as officers and shareholders of CCC by issuing the 7,000 shares of Bank stock. F.F. Nos. 323 and 326.

On October 22, 1991, in apparent anticipation of the Wenzel Lawsuit, Donohoo, Mathies and Rasmussen, in their capacity as directors of Capital Bank, issued a board resolution requiring Capital Bank to pay all attorneys' fees, expenses, and liabilities associated with the defense of the Wenzel Lawsuit, and to reimburse and indemnify all defendants in the Wenzel Lawsuit including Respondents Godbout-Bandal and Field who were neither officers nor directors of Capital Bank. FDIC Ex. No. 28mmm.

b. The ALJ's Findings and Conclusions.

1) The Interests of the Defendants in the Wenzel Lawsuit.

The ALJ found that "so long as the interests of the Bank and individual respondents are indivisible," payment by the Bank for the Wenzel Lawsuit is appropriate. Based on the ALJ's findings, amply supported by the Record, the Board concludes that the ALJ's analysis was incomplete,

and led him to the wrong conclusion.[51] The Board disagrees with the ALJ's conclusion that the interests of Capital Bank and the Individual Respondents are "indivisible."[52]

The Wenzel Lawsuit was a fight among shareholders of CCC for control of Capital Bank. The

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[51] The Board cannot reconcile the ALJ's findings with his recommendation. He finds that:

> Each Individual Respondent was unjustly enriched within the meaning of section 8(b)(6)(A)(i) of the [FDI] Act . . . in connection with their respective violations of [Minnesota law governing indemnification] or unsafe or unsound practices involving the Wenzel Lawsuit by being indemnified for or receiving the benefit of the Bank's payment and undertaking for the payment of all attorneys' fees, expenses and liabilities incurred on behalf of all defendants to the Wenzel Lawsuit. C.L. No. 78, R.D. at 138.

He also concluded:

> Donohoo and Mathies caused the Bank to pay all the expenses of defending the Wenzel Lawsuit, including their own. As the result of their misconduct, the Bank has suffered financial loss in the form of attorneys' fees and expenses in defending itself and them in [the Wenzel Lawsuit] and will probably suffer additional loss from the Wenzel Lawsuit. R.D. at 83.

Notwithstanding these well-supported findings, the ALJ does not recommend an order requiring the Individual Respondents to reimburse Capital Bank for payments made on their behalf.

[52]The ALJ also recognizes that the defendants' counterclaims have nothing to do with the Bank, and he recommends that the individual defendants pay all expenses related to them. The Board concurs and rejects Respondents' Exception to the ALJ's finding. Based on the record in this proceeding, the counterclaims, which relate to the indictment of the Wenzels in a separate proceeding, is of interest only to defendants Donohoo and Mathies in connection with their purchase of CCC shares. It has nothing to do with Capital Bank.

essence of the dispute was the actions taken against CCC, Heaton, and the Wenzels (respectively shareholder and security holders of CCC) by Donohoo and Mathies in their capacity as shareholders, officers, and directors of CCC. The lawsuit plaintiffs alleged they were damaged by the issuance of 7,000 shares of Bank stock authorized by the directors of CCC, because they lost control of Capital Bank and the value of their CCC shares was reduced. CCC sought to regain control of Capital Bank and the Wenzels sought to restore the value of their collateral. Capital Bank was made a defendant primarily to enable the court to provide appropriate relief if the plaintiffs won.[53] Hence, Capital Bank was not central to this lawsuit and should have been taking a back seat, not the leading oar.

Moreover, as a defendant, the Bank was exposed to liability for acts which it did not commit, namely self-serving acts of the Individual Respondents in their capacities primarily as directors, officers, and shareholders of CCC.[54] The primary duty of Bank's counsel should

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[53]The central issues of the Wenzel Lawsuit complaint involve the Individual Respondents and their actions as officers, directors, and shareholders of CCC. See fn. 54, infra. Only the portions of the complaint in the Wenzel Lawsuit seeking relief really pertain to the Bank, which, for example, as a party to the lawsuit could be ordered to issue shares to the plaintiffs to restore the value lost when shares were issued and sold to the Individual Respondents.

[54] Case law establishes that indemnification is not proper where the acts giving rise to the lawsuit were not performed by the defendants in their capacity as officers and directors or were performed in their personal capacities or for purely personal reasons, Tomash v. Midwest Technical Development Corporation, 160 N.W.2d 273 (Minn. 1968); Plate v. Sun-Diamond Growers of California, 225 Cal. App.3d 1115, 275 Cal. Rptr. 667 (1990); Petty v. Bank of New Mexico Holding company, 190 N.M. 524, 787 P.2d 443 (1990); Sorenson v. The Overland

have been to seek indemnity from the Individual Respondents and to advocate in the lawsuit that the Bank was not liable for the acts of the Individual Respondents. See Sorenson v. Safety Flate, Inc., 298 Minn. 353, 216 N.W.2d (1974). This was not done.[55]

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corporation, 242 F.2d 70 (3rd Cir. 1957). The complaint in the Wenzel Lawsuit contains allegations of misconduct by Mathies, Donohoo, and Rasmussen in their capacity as Bank officers and directors, and as Bank directors and officers they did call a special shareholders' meeting for the purpose of increasing the Bank's authorized level of stock, and they issued and sold the stock. See FDIC Ex. No. 304a, ¶¶ 5, 6 and 7; FDIC Ex. Nos. 28nn, 28pp; Tr. 182-203. However, it is the misconduct of Donohoo and Mathies as officers and directors of CCC, not the Bank, that enabled them to authorize the increase in stock of the Bank and improperly acquire control. It is the improper acquisition of control, to the detriment of CCC and the holders of the Wenzel Note, which is the gravamen of the complaint in the Wenzel Lawsuit. The complaint also alleges self-dealing by Mathies and Donohoo as co-shareholders of CCC in negotiating with the RTC for the purchase of the holding company's stock loan, and breach of their fiduciary duties as directors of CCC in authorizing the increase in the Bank's stock. Other allegations pertain to breach of the Stock Purchase and Option Agreement between Donohoo, Mathies, and Heaton for the purchase of CCC stock, and breach of the related pledge agreement. Moreover, the three counterclaims pertain to the sale of CCC stock to Donohoo and Mathies. None of these allegations involve Donohoo and Mathies as directors of the Bank. The actions of Donohoo, Mathies, and Rasmussen as directors and officers of the Bank were minor ministerial actions in the context of the Wenzel Lawsuit.

[55] This failure has been extremely detrimental for the Bank. The initial judgment issued in the Wenzel Lawsuit ordered damages only against Respondents Donohoo and Rasmussen in the amount of $523,600. However, the final judgment order made Capital Bank liable for this amount under the theory of vicarious liability. Second Amended Order for Judgment, December 15, 1994. Whether counsel for the Bank, which replaced Respondent Lindquist & Vennum shortly before the trial, has appealed the judgment against the Bank is not part of this record. Moreover, the eleventh hour substitution of counsel for the

The Board is of the view that whenever a bank and individual officers or directors thereof are common defendants concerning a legal claim in which bank assets could be at risk and which involves a matter or transaction in which the individual officers or directors received some benefit, the desirability of common counsel representing both the bank and other insider defendants must be carefully scrutinized by non-interested parties such as non-interested directors or special counsel. Here, the Board finds that the failure of the Bank's fiduciaries, both its directors and counsel, to require independent assessment of the Bank's need for independent representation in the Wenzel Lawsuit exposed the Bank to unnecessary risk and expense and constituted an unsafe or unsound practice.[56]

Independent analysis on behalf of the Bank of the issues in the Wenzel Lawsuit would have revealed that on the issues of the value of the Bank's shares and the improper loans alleged to have financed the stock purchases, Capital Bank gained nothing by support of the

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Bank could not cure earlier deficiencies resulting from the absence of independent Bank counsel.

[56] See e.g., ABA Model Code of Professional Conduct Rule 1.7 (1992); The Director's Book at 52-53, Office of the Comptroller of the Currency (1987). See also, decisions interpreting the fiduciary duties of trustees under the Employee Retirement Income Security Act of 1974, Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984); Donovan v. Bierwirth, 680 F.2d 263 (2d Cir. 1982) in which the court held that the trustees' investigations did not amount to the thorough, careful, and impartial investigation needed to justify actions which would, at least incidentally, benefit themselves. 680 F. 2d at 272. The court noted that "one way for the trustees to inform themselves would have been to solicit the advice of independent counsel." Id.

defendants. There was no advantage for Capital Bank to argue the defendants' valuation was correct. If plaintiffs were right, the Bank might be entitled to more money. Nor should Capital Bank have been defending the stock loans. Since the individual defendants are the beneficiaries of the alleged less-than-book-value sale and the favorable loans, they could adequately protect their own interests. Finally, Capital Bank had no interest in the question of who owned the controlling interest in the Bank, other than to assure that the laws concerning control of the Bank were observed.

Even if there were some commonality of interest between Capital Bank and the other lawsuit defendants, there certainly was no parity of interest. Capital Bank's only reason to actively participate in this litigation was to separate itself from the Individual Respondents and claim contribution from them.[57] There was certainly no reason for it to fund the defense of all parties. The individual defendants had much stronger interests in a vigorous defense to protect their investments. Capital Bank's interest, if any, was a distant second. The Board concludes that the interests of the Bank and the Individual Respondents are not indivisible, and that Capital Bank's

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[57] The justifications for obligating the Bank to defend the Individual Respondents stated in the October 22, 1991, minutes of the Bank's board of directors are totally spurious, as is the testimony of Kevin Costley regarding the appropriateness of Capital Banks' payment on behalf of all defendants. See, FDIC Ex. No. 28mmm; Resp. Br. at 85; Tr. 2128-29. Most disingenuous is the claimed obligation by the Bank to "defend the title to its stock since it was the entity that sold the stock to the shareholders." FDIC Ex. No. 28mmm. There is no claim anywhere in the Wenzel Lawsuit that the issued shares were bogus or that title was in any way flawed.

funds have been improperly expended for the defense and benefit of the Individual Respondents, not for Capital Bank's defense or benefit.[58]

2) The Minnesota Indemnification Statute.

Respondents improperly committed the Bank to indemnify them, even before the Wenzel Lawsuit was filed. The Minnesota statute governing indemnification[59] and advances, Minn. Stat. Ann. § 300.083, Subdivision 2,[60]

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[58] Because its interests were different from those of the individual defendants in the Wenzel Lawsuit, the Bank should have had independent counsel. Even assuming that common counsel was acceptable, the fee arrangement, which was not "arms length" because the corporate client who paid all the fees was a captive of the other clients, cannot be justified if indemnification was not proper.

[59] Respondents' counsel claims the issue of "indemnification" is moot because no indemnification payments have been made. That no indemnification payments have been made (as opposed to "advances" of legal fees) is not surprising, since indemnification would not be made until the completion of the lawsuit. Indemnification under the Minnesota statute is essentially a post hoc determination which awaits full disclosure of all facts. Delay in payment does not moot the issue, however, particularly under the facts of this case where the indemnification resolution itself constitutes an unsafe or unsound practice and breach of fiduciary duty. See discussion infra at 60.

[60] The record is not always careful to distinguish between "advances" and "indemnification." Both are permitted under Minnesota law when certain conditions are met, but they are quite different and serve different purposes. Approximately $190,500 in legal fees was paid by Capital Bank to the Law Firm Respondents, Lindquist & Vennum and Bruce A. Rasmussen & Associates, Ltd. through February 1992. FDIC Ex. Nos. 366a & b. These are "advances" covered by the Minnesota statute because they are paid "in advance of final disposition of the proceeding," Section 300.083, Subd. 3, regardless of whether they are paid in advance of "due dates," as asserted by Respondents.

provides mandatory indemnification for officers and directors of a corporation if, with respect to the acts or omissions of the person complained of in the proceeding, the person:

> (1) . . .
> (2) Acted in good faith;
> (3) Received no improper personal benefit
> (4) . . .; and
> (5) . . . reasonably believed that the conduct was in the best interests of the corporation . . . .

Given the findings of the Board regarding Donohoo, Mathies, and Rasmussen's absence of good faith, failure to act in the best interests of Capital Bank, and receipt of improper personal benefit, it is difficult to see how they could ever satisfy the statutory criteria for mandatory indemnification. Non-mandatory indemnification, allowed by the Minnesota statute, would be proper only where an appropriate business purpose is shown, consideration paid, or a determination made by an independent board or

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Respondents' statement that "Capital Bank made no advance payments" at paragraph 7 of their Response to Request for Supplemental Information is clearly untrue, and contradicts their statement that "Lindquist & Vennum continued to bill Capital Bank for the defense of the Wenzel litigation," Id. at 16. Not only does this constitute improper advance payments, see discussion at page 59, infra, but it violates a district court ruling prohibiting the Bank from making payments on behalf of the Individual Respondents. (Richard D. Donohoo v. FDIC, 4092 Civil 914 (D.Minn. 1992)(MacLaughlin, C.J.). Respondents cannot have it both ways. Either they are advances, or they are indemnification payments.

independent counsel. See discussion at 54-55, supra. None of these factors exists with respect to Donohoo, Mathies, and Rasmussen. Nor is there reason for Capital Bank to provide indemnification for Respondents Field and Godbout-Bandal and Shari Mathies, wife of Respondent Mathies, who are not officers and directors, but simply shareholders protecting their investments. Defense of their purchase and continued ownership of the shares involves no corporate purpose.[61]

Respondents claim that the legal fees paid by Capital Bank in connection with the Wenzel Lawsuit were advances against indemnification, which are authorized by the Minnesota statute, Section 300.083, Subd. 3. The record is

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[61] Respondents claim that although excluded from the mandatory coverage of Section 300.083 as neither officers nor directors, these shareholders nonetheless may be indemnified under Section 300.083, Subd. 10, which states that "nothing in this section shall be construed to limit the power of the corporation to indemnify other persons by contract or otherwise." See also, Minn. Stat. Ann. § 300.08(b), granting corporations the discretion to "indemnify other persons" not identified in Section 300.083.

Although his findings and conclusions are inconsistent, the ALJ seems to state that all Respondents could be indemnified under Section 300.083, Subd. 10. R.D. at 102. The Board rejects this position because it conflicts with the clear intent of the statute and common sense. First, such an interpretation would mean that shareholders (in whom the Bank has a much more attenuated interest than it does in its officers and directors) would be able to obtain indemnification without meeting any of the statutory safeguards imposed upon officers and directors. Second, Respondents' reading would permit indemnification for acts totally without nexus to corporate business or interest. Third, officers and directors who cannot satisfy the requirements of Section 300.083 nonetheless would be eligible for indemnification. This would nullify Section 300.083.

clear that the Respondents have not complied with the statutory requirements for advances. Persons seeking advances are required to submit their request for advance payments in writing; the corporation must receive from each of them a written affirmation of a good faith belief that the criteria for indemnification has been satisfied; they must commit in writing to repay the amounts advanced if it is ultimately determined such criteria has not been met; and the corporation must determine that the facts would not preclude indemnification. Id. Respondents admit they have failed to comply with any of these requirements. Answer ¶ 38(g)(i) and (ii); Resp. Reply Br. at 30, fn. 24.

In addition, the board resolution permitting advances and indemnification was not made in accordance with Subdivision 6 of Section 300.083 which establishes who shall determine a person's eligibility for advances and indemnification. Because three of Capital Bank's four directors at the time were likely to be parties to the Wenzel Lawsuit, the determination was required to be made by special legal counsel, defined in the statute as "counsel who has not represented the [Bank] or a related corporation, or a director, officer, member of a committee or board, or employee whose indemnification is in issue." Minn. Stat. Ann. § 300.083, Subd. l(e). The only opinion provided to the board came from Costley, Capital Bank's lawyer. Thus, the resolution itself fails to comply with the requirements of Minnesota law and would appear to be inoperative. The Board concludes it is an unsafe or unsound banking practice for directors of a bank to issue such a resolution in clear contravention of the statutory requirements and without the necessary business purpose.

Here the resolution adopted by the board of directors of a bank conferred personal benefits upon those very same directors. Whenever such a situation arises, there is the appearance of or an actual conflict of interest. In such a situation, this Board is of the view that the propriety of the decision to bestow such a benefit should never be determined by those who will receive the benefit. Instead, the decision should be made by disinterested parties, such as independent outside directors. If there are no disinterested parties, the decision should be made only after all the facts and circumstances of the situation have been thoroughly scrutinized, and a recommendation has been obtained from a completely independent outside source such as an unrelated law firm or consultant. Here, the Board finds that the failure of the Bank's fiduciaries, both its directors and counsel, to require independent assessment of the propriety of the indemnification exposed the Bank to unnecessary risk and expense and constituted an unsafe or unsound practice.

In sum, Respondents' claim for mandatory indemnification fails because they cannot meet the standards set forth in the statute and because they failed to comply with the objective statutory requirement that "special counsel" determine whether indemnification is appropriate. Their claim for discretionary indemnification and their claim for advances under the statute must fail as well because the indemnification resolution was passed by self-interested parties, there is no corporate purpose supporting such indemnification, and Respondents failed to satisfy the prerequisites for advances under the statute.

Respondents breached their fiduciary duty to the Bank by causing it to pay legal fees on behalf of all

defendants in the absence of a statute or by-law requiring it to do so, or an arms-length agreement for sharing of costs in litigation. Accordingly, the Board will enjoin the acceptance of any further payments, advances, or indemnification payments under the October 21, 1991, board resolution, and order the Individual Respondents to reimburse Capital Bank in the amount of all payments made by the Bank to the Law Firm Respondents in connection with the Wenzel Lawsuit because Respondents' actions constituted unsafe or unsound practices, and reckless disregard for the applicable statute, by virtue of which Respondents were unjustly enriched.[62] 12 U.S.C. §§ 1818(b)(1) and (6).

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[62]Respondents also claim that the issue of indemnification is moot because the Bank will not "need" to indemnify Respondents. Allegedly, Amundson has agreed to do so. Resp. Br. at 85 fn. 18. However, the Board's reading of the Stock Purchase Agreement between Richard D. Donohoo, Shari Mathies, Craig R. Mathies, and Lloyd A. Amundson is quite different than Respondents'. The Agreement provides in relevant part:

> 10. Indemnification. Sellers and Buyer acknowledge that the Bank has agreed to indemnify Sellers and certain other Bank shareholders against any and all legal fees and costs that may be incurred by them in connection with claims that have been brought against them by the FDIC as described more fully in Exhibit 4(j). (Emphasis added). Buyer agrees that, on the Closing Date, the Bank's indemnification obligation will be cancelled and replaced by Buyer's (or Buyer's assigns') indemnification of Sellers and those other Bank shareholders against all legal fees and costs (but not penalties), up to a maximum of $50,000 in the aggregate and not individually, that they (Sellers and the other Bank shareholders) may incur after the Closing Date in defending against any claim made against any of them by the FDIC. (Emphasis added).

FDIC Ex. No. 345.

c. Statutory Authority

Respondents claim that the FDIC's statutory authority to regulate indemnification payments is limited by section 18(k) of the FDI Act, 12 U.S.C. § 1828(k), to those circumstances where indemnification is sought for:

(1) administrative enforcement proceedings; or
(2) litigation initiated by a Federal banking regulator.

Because the Wenzel Lawsuit is neither an administrative proceeding nor a suit brought by the FDIC, they claim the FDIC is without authority to issue a cease and desist order regarding indemnification in the Wenzel Lawsuit. This is simply wrong. Section 18(k), added to the FDI Act by the Comprehensive Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990), was intended to bolster the FDIC's enforcement authority, not narrow it. See, H.R. Rep. No. 681(I), 101st Cong., 2d Sess. 1 (1990), reprinted in 1990 U.S.C.C.A.N. 6472. But section 18(k) of the FDI Act is irrelevant to this proceeding.

The FDIC's cease and desist authority, contained in section a (b) of the FDI Act, 12 U.S.C. § 1818(b), clearly extends to indemnification agreements by a bank that

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Thus, on its face this Agreement provides no substitute indemnification regarding the Wenzel Lawsuit. On the record before the Board, the Bank remains obligated under the indemnification resolution to indemnify the Individual Respondents for any liability imposed on them as a result of the Wenzel Lawsuit.

constitute a violation of law or otherwise constitute an unsafe or unsound practice. Abusive indemnification agreements, such as the one in this case, are a manifestation of dangerous insider practices that are the target of the FDIC's regulatory activity and well within its statutory authority. Hoffman v. FDIC, 912 F.2d 1172, 1174 (9th Cir. 1990) (abusive golden parachute prohibited). Under section 8(b), the FDIC may order the cessation of abusive indemnification payments and order reimbursement and restitution where there has been unjust enrichment or a reckless disregard for law, regulation, or prior order of the Board. In the Matter of The Citizens Bank of Clovis, Clovis, New Mexico, FDIC-91-406b, Bound Vol. 2 P-H FDIC Enf. Dec. ¶ 5208 (1993); In the Matter of The Citizens Bank of Cortez, Cortez, Colorado, FDIC-89-220b, Bound Vol. 2 P-H FDIC Enf. Dec. ¶ 5166, (1991); FDIC-84-191b, 1 P-H FDIC Enf. Dec. ¶ 5052 (1985).

d. The Law Firm Defendants.[63]

1) Institution-affiliated Parties.

The ALJ finds that the Law Firm Respondents knowingly and/or recklessly participated in the violation of Minnesota statutes, unsafe or unsound practices, and breaches of fiduciary duty by accepting the improper indemnification payments when they knew or should have known that the

[63] The Board leaves to the appropriate forum questions of possible conflict of interest, or other violations of the Minnesota Rules of Professional Conduct by the Law Firm Respondents.

indemnification was improper. R.D. at 54, 144.

He does not, however, recommend a Conclusion of Law that the Law Firm Respondents are institution-affiliated parties and thus are subject to the enforcement provisions of section 8 of the FDI Act, or recommend appropriate remediation.[64] Consistent with the holding of the United States Court of appeals for the Second Circuit in Cavallari v. Office of the Comptroller of the Currency,[65] the Board finds that the Law Firm Respondents are institution-affiliated parties and will issue an appropriate remedy.

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[64] 6412 U.S.C. § 1813(u)(4) defines the term "institution-affiliated party" to include --

> (4) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in --
>
> (A) any violation of any law or regulation;
>
> (B) any breach of fiduciary duty; or
>
> (C) any unsafe or unsound practice,

which caused or is likely to cause more than a minimal financial loss to, or significant adverse affect on, the insured depository institution.

[65] Augustus I. Cavallari, Jr. v. Office of the Comptroller of the Currency, and Board of Governors of the Federal Reserve System, _ F.3d _, 1995 WL 276954 (2nd Cir., May 11, 1995). The court upheld a removal order, a civil money penalty, and an order of restitution against a lawyer as an institution-affiliated party. The lawyer was found to have "participated" in the transactions at issue because he had provided oral and written advice which was "not the kind of good faith legal advice that FIRREA shields." He was found to have engaged in reckless behavior because he ignored a cease and desist order of which he was aware, and failed to make adequate investigation of the facts underlying his advice. 1995 WL 276954, *4.

While representation of the Bank by Lindquist & Vennum and Rasmussen & Associates, Ltd. was certainly different in degree,[66] the conduct of both Law Firm Respondents satisfies all of the elements of the definition of the term "institution-affiliated party." It is clear from the record that the Law Firm Respondents, in billing only the Bank and accepting all their fees in the Wenzel Lawsuit from Capital Bank, knowingly or recklessly disregarded the requirements of Minnesota law governing indemnification and advances, participated in unsafe or unsound practices, and violated Judge MacLaughlin's order prohibiting payments from the Bank on behalf of the Individual Respondents, see fn. 60 supra, causing more than minimal financial loss to the Bank.

Lindquist & Vennum provided two opinion letters in response to inquiry by the FDIC regarding the appropriateness of the Capital Bank board resolution to indemnify the individual defendants in the Wenzel Lawsuit. FDIC Ex. Nos. 290, 292. In each, the firm took the position that the resolution was proper. Lindquist & Vennum chose to ignore the statutory requirement applicable in this case that the determination of eligibility for indemnification be made by "special legal counsel," the statutory definition of which Lindquist & Vennum did not satisfy. See Minn. Stat. Ann. § 300.083 Subd. 1(e); Subd. 6(a)(3). Moreover, the firm knowingly ignored a valid order of the United States District Court for the District of

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[66] The Bank paid $252,755.00 to Lindquist & Vennum through April 1994 and $8,111.00 to Rasmussen & Associates, Ltd. through February 1992. Respondents claim that Rasmussen & Associates, Ltd. provided no legal services with respect to the Wenzel Lawsuit after that date, except to Respondent Rasmussen.

Minnesota prohibiting legal fees for the individual defendants to be paid by Capital Bank. In the face of such a court order, the firm's failure to apportion legal fees among the defendants constitutes reckless behavior. There is nothing in the record to support its decision to have Capital Bank pay one hundred percent of the legal fees in the Wenzel Lawsuit.

As previously discussed, the Law Firm Respondents' assertion that the bulk of their fees were incurred on behalf of the Bank and that the Individual Respondents were merely coming along for the ride, is contrary to fact and common sense.[67] Lindquist & Vennum prepared the answer filed in the Wenzel Lawsuit and was, or should have been, well aware of the true nature of the lawsuit as a dispute among the shareholders of CCC. They prepared the counterclaim, which was purely personal to Donohoo and Mathies. FDIC Ex. No. 304b. Moreover, the improper board resolution which it prepared and defended in legal opinions exposed the Bank to significant loss. At the time of the hearing the amount of legal fees paid by the Bank on behalf of all defendants, approximately $200,000, was a significant amount relative to the size of Capital Bank. F.F. No. 337. Respondent Lindquist & Vennum admits that additional attorneys' fees and expenses have been paid by the Bank on behalf of all defendants since the hearing and has submitted evidence of additional billings in the amount of $70,353.29. Most important, under the board resolution the Bank is exposed to

[67] Respondents claim all payments were made on behalf of the Bank. Resp. Reply Br. at 27; Tr. 2179. For the reasons discussed above, the Board disagrees.

substantial liability for any judgment issued against any or all of the Wenzel individual defendants.[68]

Though not earning comparable legal fees, Rasmussen & Associates, Ltd. also satisfies the definition of an institution-affiliated party and has engaged in breaches of fiduciary duty and unsafe or unsound practices for which remediation under section 8 is appropriate. The firm's only apparent principal was Respondent Rasmussen who, as a director of Capital Bank, knew all the facts. Tr. 1650. The firm through Respondent Rasmussen knew or should have known of the divergent interests of Capital Bank and the Individual Respondents in the Wenzel Lawsuit. The firm participated in the presentation of the counter-claim and knew or should have known that because the counter-claim only asserted claims related to individual defendants, not the Bank, the Bank's payment for legal fees in connection therewith was improper. By court order the individual defendants in the Wenzel Lawsuit were prohibited from having their legal fees in connection with the Wenzel Lawsuit paid by the Bank. The firm was aware of the court order, but billed Capital Bank and accepted legal fees from Capital Bank for representation of individual defendants in spite of the court order. The impropriety in accepting the fees was compounded by the firm's attempt to evade the court order by asserting that all

[68] Even if the court order holding the Bank liable under the theory of vicarious liability for the judgment against Donohoo and Rasmussen is overturned on appeal, there is nothing in the record before the Board indicating that the October 1991 board resolution has been rescinded. Thus the Bank remains liable under the October 1991 board resolution.

legal services were provided on behalf of the Bank.[69] Most importantly, the firm knew or should have known that the requirements of section 300.083 had not been complied with, especially the requirement that the determination to advance expenses should have been made by special legal counsel. Tr. 2156-57, 2161-62. Although its legal fees were not substantial, the firm's participation and acquiescence in the scheme to have Capital Bank fund the entire defense of the Wenzel Lawsuit resulted in substantial loss to the Bank and exposure to substantial liability.

The Board concludes that the Law Firm Respondents are institution-affiliated parties within the meaning of section 3(u)(4) of the FDI Act. As such, they are subject to the provisions of section 8 of the FDI Act. The Law Firm Respondents will be ordered to reimburse Capital Bank for the entire amount of legal fees paid to them by Capital Bank in connection with the Wenzel Lawsuit.[70] Because of their knowing disregard of Minnesota law, because of their failure to provide independent representation of the Bank, and because of their failure to comply with the order of Judge MacLaughlin, all fees were obtained as a result of violations of a court order, breaches of fiduciary duty, and unsafe or unsound banking practices. Accordingly, divestiture of their improper gain is appropriate.

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[69] As counsel to the Bank, the firm had an obligation not to cause the Bank to violate the court order.

[70] The Board's Order requiring reimbursement by the Individual Respondents and reimbursement by the Law Firm Respondents will provide for joint and several liability to avoid double payments to the Bank.

ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following specific additional findings of fact and conclusions of law are made necessary by the Board's decision.

1. At all times pertinent to this proceeding, Rasmussen and Associates, Ltd. and Lindquist & Vennum were institution-affiliated parties of Capital Bank within the meaning of section 3(u)(4) of the FDI Act, 12 U.S.C. § 1813(u)(4), in that Rasmussen and Associates, Ltd. through Respondent Rasmussen, and Lindquist & Vennum, through David A. Allgeyer, Sally J. Whiteside, and Kevin J. Costley, knowingly and/or recklessly participated in violations of a court order, breaches of fiduciary duty, and unsafe or unsound practices in connection with Capital Bank which caused or are likely to cause more than minimal financial loss to Capital Bank.

2. The violations of the CBCA, as well as other violations of Regulation O and Section 23A and unsafe or unsound practices committed by the Individual Respondents in furtherance of their scheme to acquire control of Capital Bank, involved a reckless disregard for the CBCA, Regulation O and Section 23A.

3. The Wenzel Lawsuit was brought about by self-serving and abusive violations of law, regulation and order, breaches of fiduciary duty, and unsafe or

unsound practices committed by the Individual Respondents in furtherance of their scheme to illegally and wrongfully acquire control of Capital Bank.

4. It was an unsafe or unsound practice by Donohoo, Mathies, and Rasmussen to cause, and by all Individual Respondents to accept, payment by Capital Bank for their legal fees and expenses, incurred in the Wenzel Lawsuit and to permit Capital Bank to pay and undertake the payment of and indemnification for all attorneys' fees, expenses, and liabilities associated with the Wenzel Lawsuit.

5. Donohoo, Mathies, and Rasmussen did not satisfy the requirements for mandatory indemnification and advances of section 300.083 of the Minnesota Statutes, Minn. Stat. Ann. § 300.083, specifically subdivisions 2, 3 and 6 of section 300.083.

6. Respondents Donohoo, Mathies, and Rasmussen were not entitled to mandatory indemnification because their actions in connection with the purchase of Capital Bank shares and in causing the Bank to pass the indemnification resolution and to pay legal fees of all defendants in the Wenzel Lawsuit:

> (a) were not done in good faith within the meaning of subdivision 2(a)(1) of section 300.083, Minn. Stat. Ann. § 300.083 subd. 2(a)(1);

(b) resulted in improper personal benefit to Donohoo, Mathies, and Rasmussen within the meaning of subdivision 2(a)(2) of section 300.083, Minn. Stat. Ann. § 300.083 subd. 2(a)(2); and

(c) were not reasonably believed by them to be in the best interests of Capital Bank because they knew or should have known that their illegal and wrongful acquisition of control of Capital Bank would result in legal or administrative proceedings against them by the Wenzels, Heaton, the FDIC, and/or Midwest Federal.

7. None of the Respondents were entitled to discretionary indemnification because the indemnification resolution was passed by self-interested parties, there is no corporate purpose for such indemnification and Respondents failed to satisfy the prerequisites for advances under the statute.

8. The actions of directors Donohoo, Mathies and Rasmussen in causing the Bank to pass the indemnification resolution and to pay legal fees of all defendants in the Wenzel Lawsuit were breaches of fiduciary duty and unsafe or unsound banking practices.

9. The Law Firm Respondents knowingly and/or recklessly participated in breaches of fiduciary duties and unsafe or unsound practices in connection with the indemnification of the Individual

Respondents by Capital Bank and the billing and accepting of all legal fees and expenses for the defense of the Wenzel Lawsuit solely from Capital Bank. Evidence of record indicates that the Bank has paid $260,866.00 in legal fees and expenses to the Law Firm Respondents for the defense of the Wenzel Lawsuit.

10. These breaches of fiduciary duty and unsafe or unsound practices have caused or are likely to cause Capital Bank more than minimal financial loss and/or have a significant adverse effect on Capital Bank.

RELIEF

1. Order of Prohibition

The record contains more than substantial evidence to support FDIC Enforcement Counsel's allegation of each element of a violation of section 8(e) of the FDI Act. Donohoo and Mathies engaged in repeated misconduct, including violation of the CBCA, Regulation O, Section 23A, and numerous unsafe or unsound practices and breaches of fiduciary duty. They realized financial gain from their misconduct in connection with the insider loans, the issuance of bonuses to themselves, the purchase of their shares at less than fair market value, the sale of their shares of Bank stock for $1,351,000 more than their investment, and payment of their attorney fees and expenses in connection with defense of the Wenzel Lawsuit. At the time of the hearing Capital Bank had paid approximately $190,000 in legal fees resulting from this misconduct and illegal acquisition of control. Since then, the amount has

increased to more than $260,000. The record is replete with evidence of Donohoo's and Mathies' personal dishonesty and self-dealing. They engaged in the consummate pattern of insider abuse. Their conduct was voluntarily engaged in over a period of time with heedless indifference to the consequences. It involved both willful and continuing disregard for the safety or soundness of Capital Bank.

2. Civil Money Penalties

a. Restitution Inappropriate.

As discussed above, in addition to an order of prohibition against Respondents Donohoo and Mathies, with respect to each Individual Respondent the ALJ's recommendation included a restitution order in the amount of illegal profit made on the sale of his or her shares of Capital Bank, and a civil money penalty:

Respondent	Restitution	CMP	Total
Donohoo	$925,554	$75,000	$1,000,554
Mathies	$925,554	$50,000	$975,554
Rasmussen	$23,600	$15,000	$38,600
Field	$295,012	$75,000	$370,012
Godbout-Bandal	$120,000	$30,000	$150,000

Because the Board has determined that restitution to Capital Bank is not an appropriate remedy in this case, the illegal profit will be added to the CMP established by the ALJ, so that each Respondent will be ordered to pay as a CMP the total amount shown above.

b. Penalties Assessed.

The record establishes that each of the Individual Respondents has violated Regulation O and the CBCA; that Respondents Donohoo, Mathies, and Rasmussen have engaged in unsafe or unsound banking practices and breached their fiduciary duty to Capital Bank and also violated the 1984 Order to Cease and Desist; and that Donohoo has violated Section 23A. Accordingly, the FDIC is entitled to assess CMPs. The CMPs sought by the FDIC are well within the maximum amount of $5,000 per day of the First Tier violation which may be assessed under sections 7(j)(16) and 8(i)(2) of the FDI Act.[71]

In determining the amount of a CMP, the FDIC must consider the following factors:

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[71] The maximum CMPs under the First Tier which may be assessed against the Individual Respondents for their respective violations and the CMPs requested are:

Respondent	Maximum CMP	CMP Sought
Donohoo	$24,660,000	$1,000,000
Mathies	$20,800,000	$1,000,000
Rasmussen	$14,535,000	$ 75,000
Field	$ 8,290,000	$ 75,000
Godbout-Bandal	$ 5,635,000	$ 75,000

Tr. 1160-1166. The maximum CMPs which may be assessed against each Individual Respondent for the violation of the CBCA alone is $3,860,000. FDIC Enforcement Counsel assert that they have alleged the necessary elements to maintain the higher Second Tier and Third Tier penalties authorized under sections 7(j)(16) and 8(i)(2) of the FDI Act. However, because the CMPs sought are more than adequately supported at the First Tier level, FDIC Enforcement Counsel does not brief the higher penalties and the Board does not address them.

(1) the size of financial resources of each Respondent;

(2) the good faith of each Respondent;

(3) the gravity of the violation;

(4) the history of previous violations; and

(5) such other matters as justice may require.

12 U.S.C. § 1818 (i)(2)(G). This Board has stated that the purpose of a CMP is "to deprive the violators of any financial benefit derived as a result of the violations, provide a sufficient degree of punishment, and an adequate deterrent to the respondents and others from future violations of banking laws and regulations." In the Matter of * * * Bank, FDIC-91-37k, 1 P-H FDIC Enf. Dec. ¶ 5063 (1986).

With respect to each Individual Respondent, the ALJ reviewed the number and seriousness of the violations, the amount of profit made from the illegal activities and other benefit received, his or her financial resources, the presence or absence of good faith, and the history of previous violations. He considered factors of augmentation and mitigation. R.D. at 115 121. In light of his determinations regarding each of these factors, he established a CMP for each Individual Respondent.

The record clearly establishes the ability of each Respondent to pay the ordered penalty. FDIC Ex. Nos. 199, 314, 315, 316, 317, 318, 322, 323, 338, 339, 340, 342, 371, 343; Tr. 1324, 1449, 1488, 1649-50, 1703,

1746-47. As found by the ALJ, the Individual Respondents each profited from their violations of the CBCA, and also from their respective violations of Regulation O, Section 23A and/or the 1984 Cease and Desist Order, because these violations were committed in furtherance of their scheme to acquire control of Capital Bank. In addition, the ALJ found that each Individual Respondent was unjustly enriched by being indemnified for or receiving the benefit of the Bank's payment and undertaking for the payment of all attorneys' fees, expenses and liabilities incurred in the Wenzel Lawsuit.

Each Individual Respondent purchased shares of Capital Bank at below market value on July 30, 1990, and sold them at a substantial profit in December 1992. The difference between what each Respondent paid for his or her shares and the sales price constitutes the illegal profit which is to be disgorged as a CMP, Tr. 1147-48.[72]

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[72] By virtue of their ability to sell control of Capital Bank, Respondents Donohoo and Mathies received a "package" of benefits in addition to the sales price of their shares under the Stock Purchase Agreement with Lloyd Amundson. Included were $400,000 escrowed to satisfy any expenses and liability of Donohoo and Mathies arising out of a collection suit filed by the Wenzels; a buy-out of their employment agreements ($200,000 each); a non-compete and consulting agreement ($300,000 each); their Bank-owned cars ($30,377 total), an escrow fund for attorney fees and expenses incurred in this proceeding ($50,000); and a $43,131 "plug figure" to reach the amount Amundson was willing to pay for Capital Bank. Because all of these items were part of the Stock Purchase Agreement and because they were all made possible by Donohoo's and Mathies' illegal control of the Bank, they are appropriately included in the gain attributed to Donohoo and Mathies. From the total amount of $2,151,108 paid by Amundson to, or for the benefit of, Donohoo and Mathies, subtraction of the $300,000 they paid for their shares results in a total net gain of $1,851,108, or $925,554 each.

Respondents seek mitigation of the proposed penalty claiming good faith reliance upon the advice of legal counsel. The Board finds they are entitled to no mitigation of the amount of the penalty because they did not rely on counsel's opinion in good faith. R.D. at 111. Moreover, the Board finds relevant to the issue of the amount of the penalty to be assessed Respondents' failure to cooperate with, and intentional misleading, of the FDIC during its investigation of the stock issuance. R.D. at 112-13.

These Respondents engaged in CBCA violations and egregious insider abuse of the type recognized by the Board as grave violations, In the Matter of Ronald J. Grubb, et al., FDIC-88-282k and FDIC-89-111e, 1 P-H FDIC Enf. Dec. ¶ 5181 (1992), aff'd 34 F.3d 956 (10th Cir. 1994).

With limited exception there is no history of prior violations. The Board notes, however, that there is evidence of violations of Regulation O in connection with the Bank's loans to Hauser in 1989, FDIC Ex. No. 12, and evidence that the purpose of a second loan from Midway was to refinance Donohoo's and Mathies' loan at Peoples Bank to cure a violation of Regulation O at Peoples Bank, FDIC Ex. No. 32. In addition, Respondent Field received criticism while he was a director of the Bank in 1984 because the Bank's loans to him were preferential, Tr. 1892-94, and Respondent Field was a member of the Bank's board of directors which consented to the issuance of the 1984 Cease and Desist Order. Tr. 1887-1888, 1893.

With respect to the final factor, contrary to Respondents' assertion, the Board agrees with the ALJ that

the fact that the insider loans have been paid[73] is entitled to only slight, if any, mitigating weight. Grubb, FDIC-88-282k and FDIC-89-111e, ¶ 5181 at A-2028. The loan to Misenor was repaid largely by Donohoo's and Mathies' $20,000 check drawn on CP-DDA and by Capital Bank from the settlement of the employment agreement between the Bank and Misenor. FDIC Ex. Nos. 65, 67; Stipulated Tr. at 208-209, 233. Field's loans were paid with the proceeds from his sale of Capital Bank stock. Tr. 2133. The loan to Godbout-Bandal's interest, PPA, was classified "Substandard" and paid only at the insistence of the FDIC that it be removed from the Bank. FDIC Ex. Nos. 13, 289; Tr. 1465.

Finally, while noting that Capital Bank's financial condition improved, the Board reiterates its conclusion in Grubb that

> . . .rarely if ever would improvement in a bank's financial condition be a matter required by justice to be considered in determining the amount of a civil money penalty. The purpose of civil money penalties is to deter abusive insider conduct which has traditionally been a major cause of bank failures. The purpose would be substantially defeated if only those instances of conduct which ultimately result

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[73] At the time of the hearing the Rasmussen loan still had an outstanding balance of $10,000. R.D. at 103. It cannot be determined from the record whether a balance remains. To the extent that it does, payment will be ordered.

in damage to the affected bank's condition could be punished.

FDIC-88-282k and FDIC-89-111e, 1 5181 at A-2029.

The Board has reviewed the evidence and finds the ALJ's recommended CMPs to be appropriate when added to the amount of profit made by each Individual Respondent. The Board will order the payment of CMPs in the following amounts:

Respondent	CMP
Donohoo	$1,000,554
Mathies	$ 975,554
Rasmussen	$ 38,600
Field	$ 370,012
Godbout-Bandal	$ 150,000

3. Cease and Desist Order

As discussed at page 63 above, the FDIC is clearly authorized to issue a cease and desist order regarding abusive and illegal indemnification agreements. 12 U.S.C. § 1818(b).

Furthermore, this authority includes the power to order restitution and reimbursement under the facts of this case. Section 8(b)(1) of the FDI Act authorizes the FDIC to issue orders to cease and desist from any unsafe or unsound practice or any violation of a law, rule, or regulation. The FDIC may also:

> by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties . . . to take affirmative action to correct the conditions resulting from any such violation or practice.

12 U.S.C. § 1818(b)(1).

Therefore, an order requiring the Law Firm Respondents, as institution-affiliated parties, and the Individual Respondents, to reimburse Capital Bank for all monies paid in connection with the Wenzel Lawsuit is appropriate.

CONCLUSION

Based on the Findings set forth herein and those adopted from the Recommended Decision of the ALJ, the Board concludes that there is substantial evidence on the record as a whole to support the issuance of an Order of Prohibition against Respondents Donohoo and Mathies; Civil Money Penalties against Respondents Donohoo, Mathies, Rasmussen, Field, and Godbout-Bandal; and an Order to Cease and Desist against each of the Individual Respondents and the Law Firm Respondents regarding acceptance of Payment of legal fees and expenses by Capital Bank on behalf of any defendant in the Wenzel Lawsuit and requiring the Individual Respondents and Law Firm Respondents to reimburse Capital Bank for all amounts paid by the Bank in connection with the Wenzel Lawsuit.

ORDER

The Board of Directors of the FDIC has considered the entire record in this proceeding. For the reasons set forth above, it enters the following ORDERS:

I. ORDER OF PROHIBITION -- Respondents Richard D. Donohoo and Craig R. Mathies.

Respondents Donohoo and Mathies, individually and as officers, directors, and persons participating in the conduct of the affairs of, and institution-affiliated parties of, Capital Bank, St. Paul, Minnesota, having violated laws, regulations, and a cease and desist order which has become final, having engaged in unsafe and unsound banking practices, having breached their fiduciary duties, and having received financial gain and other benefit by reason of such violations and breaches involving personal dishonesty and a willful and continuing disregard for the safety and soundness of the institution:

1. shall not hold any office in, or participate in any manner in the conduct of, the affairs of any insured depository institution, agency, or organization described in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818 (e)(7)(D);

2. shall not exercise in any manner bank stock voting rights in any insured depository institution, agency, or organization described in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. §

1818(e)(7)(A), without prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D);

3. shall not violate any voting agreement with respect to any insured depository institution, agency, or organization described in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), previously approved by the appropriate Federal financial institutions regulatory agency without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D);

4. shall not vote for a director, or serve or act as an institution-affiliated party, as that term is defined in section 3(u) of the FDI Act, 12 U.S.C. § 1813(u), of any insured depository institution, agency, or organization, described in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

II. ORDER TO PAY CIVIL MONEY PENALTY -- Respondents Richard D. Donohoo, Craig R. Mathies, Bruce A. Rasmussen, Cheryl C. Godbout-Bandal, Wayne Field.

By reason of the violations of law, regulation and/or cease and desist order, unsafe or unsound practices and/or breaches of fiduciary duties engaged in by each Respondent, and after taking into account the appropriateness of the penalty with respect to the financial resources and the good faith of each Respondent, the gravity of the violations, the history of previous violations, and such other matters as justice may require, penalties are hereby assessed against Respondents pursuant to sections 7(j)(16), 8(i)(2) and 18(j)(4) of the FDI Act, 12 U.S.C. §§ 1817(j)(16), 1818(i)(2) and 1828(j)(4), as follows:

(a) against Respondent Richard D. Donohoo, a penalty of $1,000,554;

(b) against Respondent Craig R. Mathies, a penalty of $975,554;

(c) against Respondent Bruce A. Rasmussen, a penalty of $38,600;

(d) against Respondent Cheryl C. Godbout-Bandal, a penalty of $150,000; and

(e) against Respondent Wayne Field, a penalty of $370,012.

III. ORDER TO CEASE AND DESIST -- Respondents Richard D Donohoo; Craig R. Mathies; Bruce A. Rasmussen; Cheryl C. Godbout-Bandal; Wayne Field; Lindquist & Vennum and Bruce A. Rasmussen & Associates, Ltd.

Each Individual Respondent and Law Firm Respondent having engaged in unsafe or unsound banking practices and/or have committed violations of law and regulation within the meaning of section 8(b)(1) of the FDI Act, 12 U.S.C. § 1818(b)(1) is hereby ordered to CEASE AND DESIST from the following unsafe and unsound banking practices and violations:

(a) Engaging in self dealing and insider transactions;

(b) Violating section 7(j) of the Act, 12 U.S.C. § 1817(j); and

(c) Violating section 22(h) of the Federal Reserve Act, 12 U.S.C. § 375b, and Regulation O of the Board of Governors of the Federal Reserve System, 12 C.F.R. Part 215, ("Regulation O");

IT IS FURTHER ORDERED that Respondent Bruce A. Rasmussen shall pay any outstanding unpaid balance plus interest on Loan No. 4100-29836 entered into between Peoples Bank and Respondent Rasmussen on or about July 30, 1990, and any amendments thereto.

IT IS FURTHER ORDERED that with respect to any expense or legal fees arising out of, or in connection with, the lawsuit entitled:

Alice E. Wenzel, Ronald G. Wenzel and Lawrence D. Wenzel, Trustees under the Gilbert P. Wenzel Testamentary Trust and Capital City Corporation,

Plaintiffs v. Craig R. Mathies and Richard D. Donohoo, Shari Mathies, Bruce Rasmussen, Wayne Field, Cheryl Bandal, Capital Bank, John Roe and Mary Roe and John Doe and Mary Doe filed in the State of Minnesota District Court ("Wenzel Lawsuit").

Within 30 days of the effective date of this ORDER, the Law Firms and each Individual Respondent, jointly and severally shall make restitution or provide reimbursement to Capital Bank for any and all attorneys' fees, disbursements or any other expense or liability paid by Capital Bank to Bruce A. Rasmussen & Associates, Ltd., and/or to Lindquist & Vennum through the date of this Order on behalf of Capital Bank and/or any other defendant in connection with, or arising out of, the Wenzel Lawsuit.

This ORDER shall become effective 30 days from the date of its issuance.

The provisions of this ORDER shall remain in effect and enforceable except to the extent that, and until such time as, any provision of this ORDER shall have been modified, terminated, suspended, or set aside by the FDIC.

IT IS FURTHER ORDERED, that copies of the Decision and Order be served upon all Respondents, counsel for all parties, the ALJ, and the Commissioner of Commerce for the State of Minnesota.

By direction of the Board of Directors.

Dated at Washington, D.C., this 5th day of July, 1995.

Jerry L. Langley
Executive Secretary

[SEAL]